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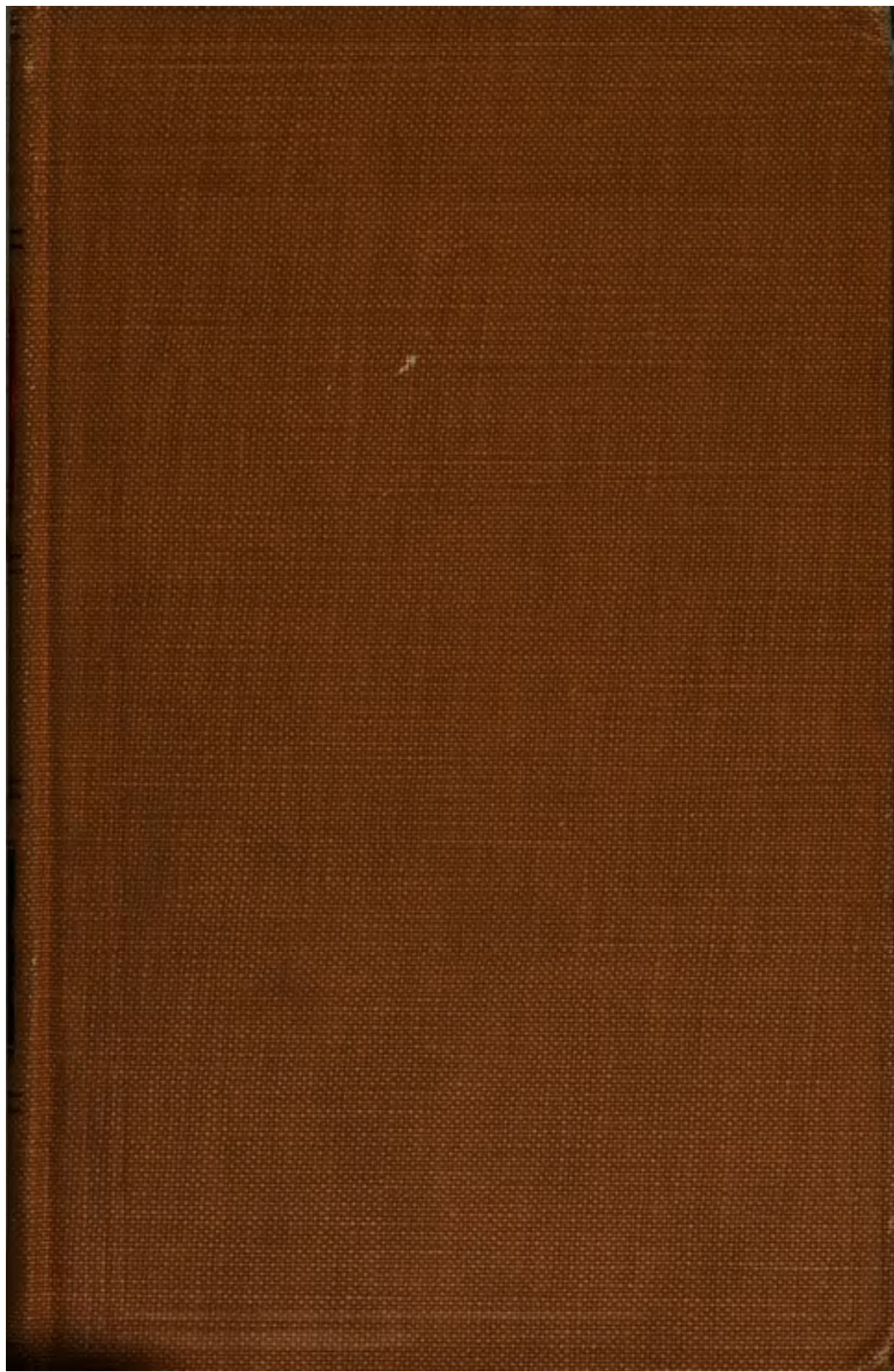
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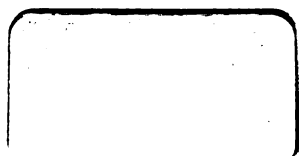
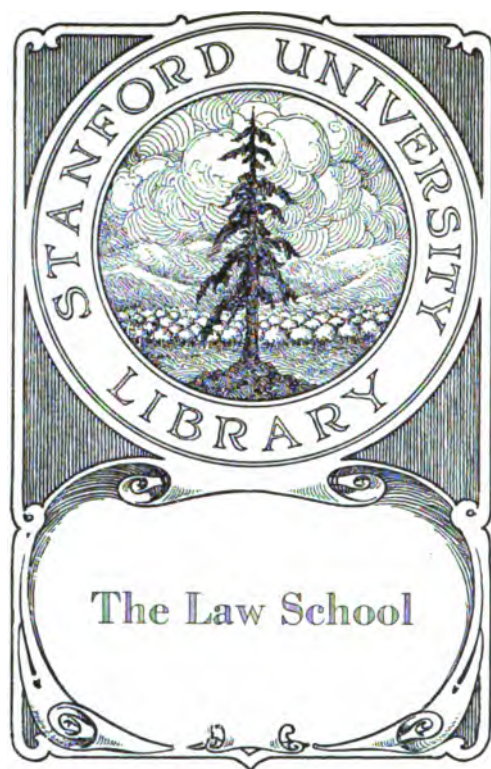
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CASES ON THE LAW
OF
BILLS, NOTES, AND CHEQUES.

To accompany this volume.

**THE LAW OF BILLS, NOTES, AND CHEQUES. Second
Edition. By MELVILLE M. BIGELOW, PH.D.**

CASES
ON
THE LAW OF BILLS, NOTES,
AND CHEQUES

BY
MELVILLE M. BIGELOW

SECOND EDITION

BY
FRANK LESLIE SIMPSON, A.B., LL.B.,
INSTRUCTOR IN BOSTON UNIVERSITY LAW SCHOOL

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NOTE.

THE first edition of the Cases on the Law of Bills, Notes, and Cheques was prepared more particularly to accompany and illustrate the work on that subject by Melville M. Bigelow, LL. D., and was not suited fully for the use of students in the class-room as a basis of study. The present edition, made necessary by the revision of the text-book, and by the codification of the subject, has been prepared, following the order of the revised text, especially for such use. Accordingly, it has been necessary to enlarge the book greatly by the addition of many cases; and this has been done with the aim to collect a set of illustrative cases which shall present as comprehensive a view of the subject as can be treated in a course in school.

The plan of the book is to lead the student, in his study, to look upon the law of the subject from the standpoint of the law merchant; accordingly, cases have been selected, when possible, which put in the foreground the customs of merchants and bankers as the basis of decision. The head-notes to the cases are aimed to enforce the point, and, at the same time, to present a concise and, as far as possible, a continuous statement of principles and rules, which are illustrated by the cases.

No attempt has been made to prepare a complete annotation of the law of commercial paper, and, in so far as notes have been added or citations given to the Statute or the authorities, the purpose has been to aid in bringing the student to a right point of view, and at the same time developing a working knowledge of the law as it is. Much stress is laid upon the necessity of right theory as the starting-point of study.

This plan has the approval of Dr. Bigelow, by whom the editor was chosen to prepare the present edition.

As to the study of cases, a word of suggestion may be added in the language of Dr. Bigelow in his note to the first edition :

“The report of a case usually consists of five separable parts; and to bring about the best results the report should be studied accordingly, part by part, in natural order. The parts, and their order of sequence, are these : —

1. Nature of the action (*e. g.*, indorsee against maker of a note).
2. Essential facts.
3. Point or points in dispute.
4. Decision (*e. g.*, instrument not negotiable).
5. Ground of decision.

Taking up the work accordingly, the student should not leave a case until he can state it, without hesitation, clearly and effectively, from beginning to end.”

F. L. S.

BOSTON UNIVERSITY LAW SCHOOL,
September, 1905.

CONTENTS.

CASES REPORTED	Page xi
STATUTES REPORTED	xiv

CHAPTER I.

LAW MERCHANT	1
Law Merchant	1
Consideration	8

CHAPTER II.

DELIVERY	21
Transfer : Nature	21
Delivery by Negligence	23
Delivery by Agent	28
Delivery on Condition	30

CHAPTER III.

FORM AND REQUISITES	40
Written Promise	40
Written Order	42
Money	43
Certainty	45
Certainty of Sum	47
Certainty of Time	53
The Payee	54

CHAPTER IV.

MAKER'S CONTRACT	60
Signature by Representative	60
Anomalous Signature of Stranger	71
Nature of the Contract	83

CHAPTER V.

	Page
ACCEPTOR'S CONTRACT	85
Drawee's Liability before Acceptance	85
Kinds of Acceptance	87
Acceptance Proper	87
Who may Accept	88
Virtual Acceptance	90
By Promise to Accept	90
By Conduct	107
Incidents of the Contract: Admissions	111

CHAPTER VI.

CERTIFIER'S CONTRACT	125
Drawee's Liability before Certification	125
Liability of Drawee to Drawer for Refusal to Honor Cheque	128
Effect of Certification on Liability of Drawer	181
Incidents of the Contract: Admissions	184
Certification of Notes	184
Of Acceptances	187
Certification in Mistake as to Funds	141
Payment under Mistake	141

CHAPTER VII.

DRAWER'S CONTRACT	152
Secondary Liability of Drawer	152
Of Bill of Exchange	152
Of Cheque	156

CHAPTER VIII.

INDORSER'S CONTRACT	163
Necessity of Indorsement	163
Form of Indorsement	168
Kinds of Indorsement	172
Special	172
In Blank	174
Restrictive	177
Who must Indorse	181
Parol Evidence to Vary Indorsement	184
Incidents of the Contract: Warranties	189
Admissions	195
Indorser's Conditional Liability	205
Presentment and Demand	205
Place of	213
Time of	227
To whom	245

CONTENTS.

ix

	Page
Notice of Dishonor : Necessity of	248
Form	251
By whom	263
To whom	267
How	268
When	269
Where	277
Due Diligence	283
Protest	288
Excuse of Steps	292
Excuse of Presentment	299
Waiver of Steps	306
Oral Waiver	308
Waiver after Maturity	312

CHAPTER IX.

ACCOMMODATOR'S CONTRACT	316
Taking with Notice	310
Fraudulent Diversion	319
Purchase after Maturity	322

CHAPTER X.

ASSURER'S CONTRACT	328
Guaranty and Suretyship: Nature	328
Discharge of Surety	335
Indorser as Surety: Discharge	338
Accommodator as Surety	348

CHAPTER XI.

HOLDER'S POSITION	358
Presumptive Title: Right to Sue	358
Absolute Defences	360
<i>Bona fide</i> Holder	372
Equities	404
Facilitating Alteration	444
Presumption: Burden of Proof	457

CHAPTER XII.

PAYMENT	461
Payment in Due Course: Surrender of Paper	461
Payment by Secondary Party	466

INDEX	499
-----------------	-----

CASES REPORTED.

A.		B.	
Adams v. King	54	Baldwin, Munn v.	268
Aldous v. Cornwell	439	Ballou v. Talbot	64
Allen, Burnham v.	16	Bank of Alexandria v. Swann	269
Allen, Farnsworth v.	248	Bank of Commerce v. Union Bank	121
Annaville National Bank v. Kettering	308	Bank of Georgia, Bank of the United States v.	119
Armstrong v. National Bank	56	Bank of Hamilton v. Imperial Bank of Canada	148
Arnold v. Dresser	314	Bank of the United States v. Bank of Georgia	119
		Bank of the United States v. Davis	265
		Bank of the United States, Mills v.	251
		Bank of Utica v. Bender	283
		Baxendale v. Bennett	28
		Baxter v. Little	424
		Bay v. Coddington	372
		Bayley v. Taber	369
		Beal, Dickins v.	152, 286
		Beauregard v. Knowlton	161
		Beecher, Gates v.	245
		Bender, Bank of Utica v.	283
		Bennett, Baxendale v.	28
		Berkshire Bank v. Jones	307
		Bethell, Morris v.	366
		Bigelow v. Colton	82
		Binney, Taylor v.	169
		Blanchard, Grand Bank v.	224
		Boynton, Freeman v.	211
		Brown v. Butchers' and Drovers' Bank	168
		Brown v. Reed	442
		Brown, West v.	220
		Bryant, Lysaght v.	21
		Buck, Cota v.	45
		Bunker Hill National Bank, Wiley v.	128
		Burke v. Dulaney	34
		Burnham v. Allen	16
		Burr, Hale v.	300
		Burson v. Huntington	430
		Bush, Townsend v.	201
		Butchers' and Drovers' Bank, Brown v.	168
		Buttrick, Wamesit Bank v.	287
		C.	
		Carew v. Duckworth	156
		Carr v. National Security Bank	125
		Chapman v. Keane	263
		Charles, Montelius v.	227
		Cheever v. Pittsburgh, etc. R. R.	398
		Chester v. Dorr	322
		Chicopee Bank v. Philadelphia Bank	222
		Clark, Fearing v.	28
		Clark v. Pease	407
		Clark v. Sickler	335
		Clarke, Davis v.	88
		Coddington, Bay v.	372
		Coit, Paton v.	457
		Colton, Bigelow v.	82
		Commercial National Bank, Warren-Scharf, etc. Co. v.	197
		Coolidge v. Payson	90
		Cornwell, Aldous v.	439
		Cota v. Buck	45
		Crist v. Crist	181
		Cubitt, Gill v.	388
		D.	
		Dale v. Gear	184
		Dana v. Sawyer	242
		Davis, Bank of the United States v.	265
		Davis v. Clarke	88
		Davis, Fitchburg Insurance Co. v.	261
		Dedham National Bank v. Everett National Bank	115
		Dennis, Gilbert v.	254, 306
		Dickins v. Beal	152, 286
		Dix, Shoe and Leather National Bank v.	66
		Dorr, Chester v.	322
		Downer, Sylvester v.	71
		Downs, Erwin v.	196
		Dresser, Arnold v.	314
		Dresser v. Missouri, etc. Co.	393
		Duckworth, Carew v.	156
		Dulaney, Burke v.	34
		Dunavan v. Flynn	110
		Dunlop v. Silver	8

xiii

	PAGE		PAGE
Minot v. Russ	181	Roberts, Goodwin v.	1
Missouri, etc. Company, Dresser v.	893	Rooke, Gay v.	40
Montelius v. Charles	227	Ross, Swope v.	85
Morris v. Bethell	866	Russ, Minot v.	181
Moses v. Lawrence County Bank	828		
Munn v. Baldwin	268		
Musson v. Lake	205		
		S.	
N.		Sawyer, Dana v.	242
National Bank, Armstrong v.	55	Schmittler v. Simon	47
National Bank, White v.	177	Schofield v. Earl of Lonsborough	449
National Bank of the Common- wealth, Merchants' National Bank v.	141	Seabury v. Hungerford	78
National Security Bank, Carr v.	125	Shaefer, Wood's Sons Co. v.	38
National State Bank v. Weil	230	Shaw v. Knox	470
Neal, Price v.	113	Sherborne, Oridge v.	237
Newcomb v. Raynor	838	Shoe and Leather Nat. Bank v. Dix	66
Nicholls v. Webb	288	Shoenberger v. Lancaster Savings Institution	267
Norton, Windham Bank v.	292	Sickler, Clark v.	335
		Sigerson v. Mathews	312
O.		Silver, Dunlop v.	8
Ohio Insurance Co., Ellis v.	120	Simon, Schmittler v.	47
Oridge v. Sherborne	237	Slawson v. Loring	60
Oxford Bank v. Haynes	381	Small v. Smith	319
		Smith v. Kendall	50
P.		Smith, Small v.	319
Parker, Foster v.	304	Snow, Massachusetts Nat. Bank v.	427
Payson, Coolidge v.	90	Snow, Putnam National Bank v.	103
Paton v. Colt	457	Snyder, Taylor v.	213
Pease, Clark v.	407	Sohier v. Loring	342
Pettee v. Prout	358	Sondheim v. Gilbert	414
Philadelphia Bank, Chicopee Bank v.	222	Spear v. Pratt	87
Pierce, Madison Square Bank v.	466	Stanton, Kinyon v.	159
Pittsburgh, etc. R. R., Cheever v.	898	State Bank v. Fearing	195
Plummer v. Lyman	105	State Capital Bank v. Thompson	422
Powell, McLemore v.	339	State National Bank, Henrietta Na- tional Bank v.	100
Pratt, Spear v.	87	Stetson, Walker v.	277
Price v. Neal	113	Strobe, Wheatley v.	42
Prout, Pettee v.	858	Sullivan, Putnam v.	404
Putnam, Leavitt v.	172	Sutherland v. Mead	375
Putnam v. Sullivan	404	Swann, Bank of Alexandria v.	269
Putnam National Bank v. Snow	103	Swift v. Tyson	381
		Swope v. Ross	85
		Sylvester v. Downer	71
		T.	
Q.		Taber, Bayley v.	369
Quinby v. Merritt	43	Taintor, Rider v.	107
		Talbot, Ballou v.	61
		Taylor v. Binney	169
		Taylor, Lancaster National Bank v.	165
		Taylor v. Snyder	213
		Thatcher v. West River National Bank	316
R.		Thompson, State Capital Bank v.	422
Rathbone, Farmers' and Mechanics' Bank v.	348	Tower, Estes v.	83
Raynor, Newcomb v.	388	Townsend v. Buck	201
Reed, Brown v.	442	Traders' National Bank, Flour City National Bank v.	137
Rice, Exchange Bank of St. Louis v.	95	Trumper, Holmes v.	444
Rider v. Taintor	167	Tyson, Swift v.	381

CASES

ON

BILLS, NOTES, AND CHEQUES.

CHAPTER I.

LAW MERCHANT.

GOODWIN v. ROBARTS.

Court of Exchequer Chamber of England, July, 1875. L. R. 10 Ex. 337.

The usages of merchants, as recognized by the courts, constitute the law merchant.¹

ERROR by the defendants on a judgment of the Court of Exchequer in favor of the plaintiff.

The facts are stated in the opinion.

COCKBURN, C. J. The question for our decision in this case is whether certain scrip issued by the authority of the Russian Government, and certain other scrip issued by the authority of the Austro-Hungarian Government, is a negotiable security for money, so that the transfer of it by a person not being the true owner to a *bona fide* holder, for value, can confer a good title on the latter.

The scrip in question was bought by the plaintiff through one Clayton, a stockbroker, and was allowed to remain in Clayton's hands, who unlawfully pledged it with the defendants, who are bankers, as security for a loan of money. Clayton having become bankrupt and having absconded, the defendants sold the scrip at the market price of the day, and the plaintiff brings his action to recover the amount realized on such sale.

The scrip in question was in the following form:

"1873 C. 1873. IMPERIAL GOVERNMENT OF RUSSIA.

Issue of £15,000,000 sterling nominal capital in 5 per cent consolidated bonds of 1873. Negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. de Rothschild Brothers, Paris. Bearing

¹ N. I. L. § 212.

interest half-yearly, payable in London from 1st of December, 1873. Scrip for one hundred pounds stock, No. —.

Received the sum of twenty pounds, being the first instalment of 20 per cent upon one hundred pounds stock, and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial Government.

Then follow four other receipts for £20 each, making up the £100, for which the bond is afterwards to be given.

The scrip issued by the authority of the Austro-Hungarian Government was in a precisely similar form.

The scrip in question was issued by Messrs. de Rothschild as the agents of the Russian and Austro-Hungarian governments, they being employed by these governments to negotiate and raise a loan for them respectively on government bonds, bearing interest, to be afterwards issued in exchange for the scrip when all the instalments of the sum for which the scrip was issued should have been paid up. No question is raised as to the fact of Messrs. de Rothschild having acted in the matter as agents of the two governments, or of the scrip having been issued by the authority of the latter.

The ninth paragraph of the special case contains the following statement, upon which, as it appears to us, the decision of the case turns:

"The scrip of loans to foreign governments, entitling the bearer thereof to bonds for the same amount when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and Foreign Stock Exchanges, and through them by the public, for over fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealing by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognized by the foreign governments or their agents delivering the bonds when issued to the bearers of the scrip."

[The contention of the defendants was that the finding of the general usage of bankers with respect to these instruments was sufficient to determine their character as negotiable paper. *Gorgier v. Mievill*, 3 B. & C. 45, and *Attorney-General v. Bouwens*, 4 M. & W. 171, were cited by them.

Mr. Benjamin, on behalf of the plaintiff, distinguished the present

case from *Gorgier v. Mievill*, 3 B. & C. 45.] He insisted, first, that although it must be admitted that, if a bond had been given in lieu of this scrip, the bond would have been a negotiable instrument, as the case would then have come within *Gorgier v. Mievill*, 3 B. & C. 45, here there was no engagement on the part of the foreign government. The only party signing the scrip, or who could be held bound by it, were the Messrs. de Rothschild; and the persons advancing their money, and taking the scrip, could look only to them. Secondly, that even assuming that the issuing of the scrip was to be taken to be the act of the foreign government, yet that as it had been issued in London, and the parties taking it had advanced their money in this country, the contract must be taken to have been made here, and must be subject to the law of England. That when a foreign sovereign negotiated a loan in this country, through his agent, it was in effect the same thing as though such sovereign had himself come to this country and entered into the contract in person. That, consequently, in either view, the contract arising on the scrip must be taken to have been made here, and must be dealt with according to English law. That this being so, the case of *Crouch v. The Crédit Foncier of England*, Law Rep. 8 Q. B. 374, was an authority which established that it was not competent to any one, by the law of England, to give to a security, not negotiable by the law merchant, the character of negotiability, by making it payable to bearer, even though such security were a security for money. That, *a fortiori*, this scrip, not being a promise to pay money, but only to give a bond when all the instalments should have been paid up, could not have the character of negotiability given to it by being made payable to bearer. That choses in action not being assignable by the general common law, it was only by the law merchant, which was recognized by the common law and adopted by it, that a particular class of securities for money could be made negotiable, either by indorsement, or by being made payable to bearer; and that this class of securities was confined to bills of exchange, promissory notes, and drafts payable to bearer. That this scrip did not coincide with either of the securities for money to which by the law merchant, the quality of being so rendered negotiable had been conceded; the more so as in fact it was not a security for money at all, but only an agreement to give such a security in the shape of a bond. That the bonds of foreign governments had been held to be negotiable by the courts of this country, not because they were negotiable by the law of the country in which they were made, but because they were in substance and effect promissory notes.

[Messrs. de Rothschild are not bound on the scrip. “If an agent, on behalf of government, makes a contract and describes himself as such, he is not personally bound, even though the terms

of the contract be such as might, in a case of a private nature, involve him in personal liability.'” 2 Kent's Commentaries, 7th ed., p. 810.]

We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract, as we agree in thinking that its negotiable character, if it exists at all, must depend not on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here. “The question,” says Tindal, C. J., in *Lang v. Smyth*, 7 Bing. 284, at page 293, “is not so much what is the usage in the country whence the instrument comes, as in the country where it passed.” The substance of Mr. Benjamin's argument is, that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach.

Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. “When a general usage has been judicially ascertained and established,” says Lord Campbell, in *Brandao v. Barnett*, 12 Cl. & F. at p. 805, “it becomes a part of the law merchant, which courts of justice are bound to know and recognize.”

Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later and but slowly, into England.

According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure*, Cro. Jac. 6, in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise.

From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on Bills, 8th ed., p. 13.

[In the meantime, promissory notes had come into use, and for some time the courts of law acted upon the usages with reference to them, as well as with reference to bills of exchange. But Holt, C. J., set himself against the custom. The inconvenience to trade arising therefrom led to the passage of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were put on the same footing as bills of exchange. Goldsmith's notes and cheques were also recognized as negotiable instruments, following the custom of merchants.]

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usage, adopted by the courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such.

The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience.

[In *Crouch v. The Crédit Foncier of England*, Law Rep. 8 Q. B. 374, the defendants had issued bonds payable to bearer, "subject to the conditions indorsed on this debenture." It was held, that, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. But it was said that the custom as to these instruments was of very recent origin, and hence could not give the character of negotiability to them, because the custom, being recent, formed no part of the ancient law merchant.]

For the reasons we have already given we cannot concur in thinking the latter ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shown to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to *Gorgier v. Mieville*, 3 B. & C. 45, are to be treated as negotiable. We think the judgment in *Crouch v. The Crédit Foncier*,

Law Rep. 8 Q. B. 374, may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called "the ancient law merchant."

We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself. Thus, it having been decided in the two cases of *More v. Manning*, 1 Comyns' Rep. 311, and *Acheson v. Fountain*, 1 Str. 557, that when a bill of exchange was indorsed to A B, without the words "or order," the bill was nevertheless assignable by A B, by further indorsement, Lord Mansfield and the Court of King's Bench, in the case of *Edie v. The East India Company*, 2 Burr. 1216, held that evidence of a contrary usage was inadmissible. [See also *Grant v. Vaughn*, 3 Burr. 1516.]

If we could see our way to the conclusion that, in holding the scrip in question to pass by delivery, and to be available to bearer, we were giving effect to a usage incompatible either with the common law or with the law merchant as incorporated into and embodied in it, our decision would be a very different one from that which we are about to pronounce. But so far from this being the case, we are, on the contrary, in our opinion, only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer, as assignable by delivery. This being the conclusion at which we have arrived, the judgment of the Court of Exchequer will be affirmed.

Judgment affirmed. *

DUNLOP v. SILVER.¹

Circuit Court, District of Columbia, July, 1801. 1 Cranch, 367.

The general presumption of liability was transformed by the common-law judges into a particular presumption of consideration.

ACTION by the indorsee of a negotiable promissory note against a remote indorser.

James Cavan made a promissory note payable to Silver *et al.* or order, sixty days after date, in the sum of \$600, for value received, negotiable at the Bank of Alexandria. Silver *et al.* indorsed the note to Downing & Dowell, who indorsed it, "Pay the contents to John Dunlop or order." Dunlop had obtained judgment and execution against the maker, who took the oath of an insolvent debtor. He now sued Silver as indorser.

Two Counts. 1. A special count stating the making and indorsing, the suit, judgment, execution, and insolvency of the maker, by reason whereof the defendant became liable, etc. 2. *Indebitatus assumpsit* for money had and received. Plea, *non assumpsit*, and verdict for the plaintiff subject to the opinion of the court whether the holder can maintain an action against the remote indorser of a promissory note, under Virginia law. The statute of 3 & 4 Anne, c. 9, was not in force in that State; but an Act of 1786, c. 29, existed, by which "an action of debt may be maintained upon a note or writing by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to another," and that "assignments of bonds, bills, and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; and an assignee of any such may thereupon maintain an action of debt in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant."

[The decision by KILTY, C. J., and CRANCH, Assist. J., was in favor of the plaintiff, an opinion — by which judge is not stated — having been delivered which occupies nearly a hundred pages in Cranch. No question of the kind is ever raised nowadays, and there is no occasion to follow, in detail, the elaborate examination of the subject made by the court. It is enough, so far as that is concerned,

¹ The issue was whether a remote indorser of a negotiable promissory note, in Virginia law, was liable to the holder, the court holding that such indorser was liable. At the February term, 1803, of the Supreme Court of the United States, it was held, contrary to the decision in this case, on error to the same court, that by the law of Virginia an indorsee of a promissory note could not maintain an action against a remote indorser for want of privity. *Mandeville v. Riddle*, 1 Cranch, 290. The case *supra*, thus overruled, is reported in Cranch as an Appendix to *Mandeville v. Riddle*. Its value consists entirely in its exhaustive historical review of the authorities, going back as it does to the very beginning of actions in the Superior Courts.

to remind the student that the case is an invaluable storehouse of the law of bills of exchange and promissory notes, from its first emergence in the law reports down to the time of the decision. Nowhere else can there be found such an exhaustive review of the authorities. It must suffice here to make some important extracts from the opinion, with a view to showing how the custom of merchants touching these instruments came to be grafted upon the law of England.]

A distinction seems to have been made very early between the contracts of merchants (especially of foreign merchants) and those of other people. Nearly six hundred years ago we find their "old and rightful customs" protected by the great charter of English liberties. *Magna Charta*, c. 30. . . . In the 13 Edw. IV. 9, 10, cited by Molloy, book 3, c. 7, § 15, it is said that "a merchant stranger made suit before the King's Privy Council, for certain bales of silk feloniously taken from him, wherein it was moved that this matter should be determined at common law; but the Lord Chancellor answered, that this suit is brought by a merchant who is not bound to sue according to the law of the land, nor to tarry the trial of twelve men." [The argument is that the custom of merchants had come to be treated, before the statute of Anne, as part of the common law.]

Forms of pleading often tend to elucidate the law. By observing the forms of declarations which have from time to time been adopted in actions upon bills of exchange, we may perhaps discover the steps by which the courts allowed actions to be brought upon them as substantive causes of action, without alleging any consideration for the making or accepting them. The first forms which were used take no notice of the custom of merchants as creating a liability distinct from that which arises at common law, but by making use of several fictions bring the case within the general principles of actions of *assumpsit*. The oldest form which is recollected is to be found in Rastell's Entries,¹ fol. 10 (a), under the head "Action on the case upon promise to pay money." . . . This declaration sets forth that A complains of B, etc., for that whereas the said A, by a certain I C, his sufficient attorney, factor, and deputy in this behalf, on such a day and year, at L, at the special instance and request of the said B, had delivered to the said B, by the hands of the said I C, to the proper use of the said B, £110 8s. 4d., lawful money of England; for which said £110 8s. 4d., so to the said B delivered, he, the said B, then and there to the said I C (then being the sufficient attorney, factor, and deputy of the said A in this behalf) faithfully promised and undertook that a certain John of G well and faithfully would content and pay to Reginald S (on such a day and year, and always

¹ Published at first in the year 1564, but later editions contain the case below, of 37 Eliz.

afterwards, hitherto the sufficient deputy, factor, and attorney of the said A in this behalf) 443 $\frac{2}{3}$ ducats, on a certain day in the declaration mentioned. And if the aforesaid John of G should not pay and content the said Reginald S the said 443 $\frac{2}{3}$ ducats, at the time above limited, that then the said B would well and faithfully pay and content the said A £110 8s. 4d., lawful money of England, with all damages and interest thereof, whenever he should be thereunto by the said A requested. It then avers that the said 443 $\frac{2}{3}$ ducats were of the value of £110 8s. 4d., lawful money of England, that John of G had not paid the ducats to Reginald S, and that if he had paid them "to the said R[eginald], I, B and their associates, or to either of them, then the said 443 $\frac{2}{3}$ ducats would have come to the benefit and profit of the said A. Yet the said B, contriving the aforesaid A of the said £110 8s. 4d., and of the damages and interest thereof, falsely and subtly to deceive and defraud, the same or any part thereof, to the said A although often thereunto required, according to his promise and undertaking aforesaid, had not paid, or in any manner contented, whereby the said A, not only the profit and gain which he, the said A, with the said £110 8s. 4d. in lawfully bargaining and carrying on commerce might have acquired, hath lost; but also the said A, in his credit towards divers subjects of our lord the king (especially towards R H and I A, to whom the said A was indebted in the sum of £110 8s. 4d., and to whom the said A had promised to pay the same £110 8s. 4d. at a day now past, in the hope of a faithful performance of the promise and undertaking aforesaid), is much injured, to his damage," etc. This declaration seems to have been by the indorsee of a bill of exchange against the drawer. . . . A is supposed to make I C his attorney for the purpose of paying £110 to B and to receive a promise from B that John of G should pay to Reginald S 443 $\frac{2}{3}$ ducats. And A is also supposed to have made Reginald S his attorney for the purpose of receiving the ducats. . . . [These and the like allegations are considered to be fictions.¹]

In the declaration of payee *v.* acceptor, fol. 388 (a) [of Rastell], the foreign merchant who paid the 1400 crowns to the drawer of the bill in France, to be remitted to the plaintiff (the payee) in England, is stated to be the plaintiff's factor; and the drawer of the bill is stated to be the factor of the defendant (the acceptor); so that the plaintiff, by his factor, is supposed to pay to the defendant, through the medium of the defendant's factor, the 1400 crowns, in consideration of which it is averred that the defendant in England promised the plaintiff to pay him £414 8s. 4d., lawful money of England.

This declaration sets forth that whereas the plaintiff on the tenth of June, 37 Eliz., at Rochelle in France, in parts beyond seas, by the

¹ See Bigelow, Bills and Notes, 3.

hands of a certain T S, then the factor of the plaintiff, at the request of a certain R W, then the factor of the defendant, delivered and paid to the said R W, then the factor of the defendant, to the use of the defendant, as much ready money as amounted to 1400 French crowns of the money of France, in parts beyond sea, at the rate of 5s. 11d., lawful money of England, for each French crown. And thereupon the said R W, at Rochelle aforesaid, then delivered to the said T S three bills of exchange, viz., first, second, and third; in the first of which bills of exchange the said R W requested the defendant to pay to the plaintiff at L £414 8s. 4d., lawful money of England, at the end of thirty days next after sight of that bill of exchange (the second and third bills of exchange to the plaintiff not paid). It then sets forth the tenor of the second and third bills, and then avers that the defendant, on the day and year first aforesaid, at the city of E . . . *in consideration thereof*, undertook, and to the plaintiff then and there faithfully promised, that he, the defendant, will and faithfully would pay to the plaintiff, to the plaintiff's use, at the city of E . . . by way of exchange, *according to the usage of merchants*, the aforesaid £414 8s. 4d., lawful money of England, at the end of thirty days next after sight of any of the bills of exchange aforesaid; and the plaintiff in fact saith that afterward, viz., on the 1st of September in the year aforesaid, at, etc., the first of the said bills came to the sight of, and was then and there shown to, the defendant, yet the defendant not regarding, etc., but contriving, etc., did not pay the said £414 8s. 4d., etc., at the end of the thirty days,¹ etc., whereby the defendant lost the benefit of trading with the said £414 8s. 4d., etc., to his damage £600.

In this declaration it will be perceived that the custom of merchants is not alleged as the foundation of the action or the cause of liability of the defendant. Nor is it stated that the defendant accepted the bill. But the plaintiff grounds his action upon the defendant's promise to pay the amount mentioned in the bill, in consideration of 1400 crowns paid to his use in France, and in consideration that his factor had drawn and delivered the bills to the plaintiff's factor. This idea of factorage is probably a fiction introduced for the purpose of adapting the custom of merchants to the common-law forms, and to show a sufficient consideration for the *assumpsit*. The question of factorage was not traversable. . . . This fiction might perhaps be considered as part of the custom of merchants; but at any rate it seems to have been considered necessary in order to create that degree of privity between the payee and the acceptor which at that time was supposed necessary to support the action of *assumpsit*.

But this and the former are declarations at common law. . . . They show also that if privity of contract was necessary at common

¹ Observe that "usage" is not added. It seems that added time was really *grace*; i. e., indulgence at the choice of the holder.

law to support the action of *assumpsit*, the law would presume a privity, or at least would presume facts which constituted a privity, between the payee and acceptor, or between an indorsee and a drawer of a bill of exchange.

[After reviewing later precedents before the statute of Anne, in which the fictions more or less disappear, it is stated that in these later forms the liability of defendant under the custom was thought a sufficient consideration to raise an *assumpsit* without averring those intermediate steps which might be regarded as the links of the chain of privity connecting the plaintiff with the defendant. The reason of this change, it is added, was probably the consideration that those intermediate links were only fictions or presumptions of law, which were never necessary to be stated. All the foregoing related to foreign bills.]

It is not ascertained exactly at what time *inland bills* first came into use in England, or at what period they were first considered as entitled to the privileges of bills of exchange under the law merchant. But there was a time when the law merchant was considered as "confined to cases where one of the parties was a merchant stranger," 3 Wooddeson, 109, and when those bills of exchange only were entitled to its privileges one of the parties to which was a foreign merchant. . . . In the case of *Bromwich v. Loyd*, 2 Lutw. 1585 (Hil. 8 Wm. III. C. B.), Chief Justice Treby said that "bills of exchange at first were extended only to merchants strangers trading with English merchants; and afterwards to inland bills between merchants trading one with another here in England; and after that to all traders and dealers, and of late to all persons trading or not." . . .

. . . Kyd, in his *Treatise on Bills*, p. 13 (Dublin edition, 1791), speaking of *promissory notes*, says, "the period of their introduction appears to have been about thirty years before the reign of Queen Anne;" but the only authority he cites is 6 Mod. 30 (2 Anne), the case of *Buller v. Crips* . . . in which Lord Holt says he had consulted two of the most famous merchants in London, who informed him that "it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years." . . . It is certain that promissory notes were in use upon the continent in those commercial cities and towns with which England carried on the greatest trade long before that period, and were negotiable under the custom of merchants in the countries from whence England adopted the greater part of her commercial law. They were called bills obligatory, or bills of debt, and are described with great accuracy by Malynes, in his *Lex Mercatoria*, pp. 71, 72, etc., where he gives the form of such a bill, which is copied by Molloy in p. 447 (7th edition, London,

1722), and will be found in substance exactly like a modern promissory note. . . .

As Malynes says nothing of inland bills, and yet is so very particular respecting promissory notes, the probability is, that the antiquity of the latter is greater than that of the former, and that they were more certainly within the custom of merchants. . . .

The time when inland bills and promissory notes began to be in general use in England was probably about the year 1645 or 1646; and their general use at that time may be accounted for by the facts stated in Anderson's Hist. of Commerce, vol. 1, pp. 386, 402, 484, 492, 493, 519, and 520. . . . [Here follow quotations from the book just cited, based on "a scarce and most curious small pamphlet, printed in 1676, entitled 'The mystery of the new-fashioned goldsmiths, or bankers, discovered,' in eight quarto pages." The court then proceeds:]

This short history of the goldsmiths will account for the sudden increase of paper credit after the year 1645, and renders it extremely probable that inland bills and promissory notes were in very general use and circulation. Indeed, we know that to be the fact from the cases in the books, upon examining which we shall find that there was no distinction made between inland bills of exchange and promissory notes; they were both called bills; they were both called notes; sometimes they were called "bills or notes." Neither the word "inland" nor the word "promissory" was at that time in use as applied to distinguish the one species of paper from the other. . . . [The argument proceeds that promissory notes were within the custom of merchants before the statute of Anne. Among a multitude of cases the following, *Carter v. Palmer*, 12 Mod. 380, anno 1700, is quoted:]

"Palmer had given a *note* under his hand in this form: 'I promise to pay the *bearer* so much money on demand.' Plaintiff brings his action, grounding it upon the custom of merchants, as if it were a bill of exchange, and *avers no consideration*. After verdict, upon motion in arrest of judgment, Holt, Chief Justice: 'We will take such a note *prima facie* for evidence of money lent; and though they have declared on the custom, yet we must take care that by such a drift the law of England be not changed, by making *all* notes bills of exchange.' But *all* seemed to agree if it were made payable to him *or order*, the defendant by that form had made it negotiable, and by consequence he would be liable to the action of assignee in his own name; for if a man who is no merchant will draw a bill of exchange, he is suable upon it according to the custom of merchants, for he makes himself a merchant *pro tanto*. And inland bills were not

known till trade grew to a great height; and when they obtained, they received the same law with outlandish bills. . . . *Et adjorn.*"

But let us proceed to examine the case of *Clerke v. Martin*, Pasch. 1 Anne, B. R., 2 Ld. Raym. 757; 1 Salk. 129, upon which alone is founded the assertion in modern books that before the statute of Anne promissory notes were not assignable or indorsable over within the custom of merchants, so as to enable the assignee to bring an action in his own name against the maker. The case is thus reported by Lord Raymond:

"The plaintiff brought an action upon his case . . . ; one count was upon a general *indebitatus assumpsit* . . . ; another was upon the custom of merchants as upon a bill of exchange, and showed that the defendant gave a note . . . by which he promised to pay to the plaintiff or his order, etc. . . . And it was moved in arrest of judgment that this note was not a bill of exchange within the custom of merchants, . . .

"But Holt, Chief Justice, was *totis viribus* against the action, and said that this could not be a bill of exchange; that the maintaining of these actions upon such notes were innovations upon the rules of the common law, and that it amounted to a new sort of specialty unknown to the common law, and invented in Lombard street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall." . . .

[Judgment in *Clerke v. Martin* was given for the defendant. Several cases followed, the last case before the statute being *Buller v. Crips*, 6 Mod. 29 (Mich. 2 Anne, 1703), a suit by an indorsee of a promissory note against the maker. Lord Holt took the same view he had taken in *Clerke v. Martin*; but the pressure against him was very strong, and he now said that he desired to speak with two of the most famous merchants in London "of the mighty ill consequences that was pretended would ensue" from adhering to his view of the subject. They told him plainly of the custom; "and the court at last took the vacation to consider of it." Pending the decision, the statute of Anne was passed. All these instruments, promissory notes included, had been enforced among the merchants of London at the Guildhall, in the Hustings, long before the statute of Anne.]

STATUTE THREE AND FOUR ANNE,

CHAPTER IX. 1704.

The merchants of London prevailed over the objections of Lord Holt and Parliament put promissory notes on the same footing as bills of exchange.

WHEREAS it hath been held, That notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same; therefore to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner; be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all notes in writing, that . . . shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable; and also every such note, payable to any person or persons, body politic and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do, upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her, or

their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange.

BURNHAM v. ALLEN.

Supreme Court of Massachusetts, September, 1854. 1 Gray, 496.

Suit is brought on the instrument, the production of which in evidence raises a presumption of consideration.¹

ASSUMPSIT on a promissory note, by which, the declaration alleged, the defendant, at South Hadley, on the 30th of December, 1847, for value received, promised the plaintiff to pay him or order three hundred dollars on demand; and that the plaintiff then and there demanded the same. Writ dated August 19, 1851.

The defendant pleaded the general issue, and specified in defence: 1. Want of consideration; 2. Failure of consideration; 3. Payment; and also denied the execution of the note declared upon.

At the trial in the Court of Common Pleas, before BYINGTON, J., the plaintiff gave in evidence the following note:

"\$300. So. Hadley, December 30, 1847. For value received, I promise to pay Joseph Burnham or order on demand thee hundred dollars.

EZRA ALLEN."

The defendant objected that this note did not support the declaration, and that there was a variance between the declaration and the proof. But the judge ruled that it was a proper subject for the consideration of the jury, and that if they found the word "thee" was intended for "three," by the defendant, when he signed the note, the plaintiff might recover.

The defendant contended that inasmuch as a special demand was averred in the declaration, it must be proved. But the judge ruled that the bringing of the action was a sufficient demand, and that no demand need be proved.

The defendant requested the judge to rule, upon these pleadings, that upon the general issue the burden of proof was upon the plaintiff throughout, and that if upon that issue the jury were left in doubt, the plaintiff was not entitled to recover. But the judge in-

¹ N. L. L. § 41.

structed the jury, "that the burden of proof was on the plaintiff to show that the note was given upon a valuable consideration, and that, if that was doubtful upon the whole evidence, he could not recover; that proof of the execution of the note and its production in evidence made a *prima facie* case for the plaintiff, upon which they might find a verdict for him, unless the defendant introduced evidence which showed either that it was not given for a valuable consideration, or that the consideration had failed, or evidence to render it doubtful in their minds whether it was given on a valuable consideration; and that if not so given, or if it was doubtful whether it was given for a valuable consideration, either for want of consideration or for failure of consideration, the plaintiff could not recover." The judge further ruled that the burden of proof was on the defendant to show payment. The verdict was for the plaintiff, and the defendant alleged exceptions to these rulings.

[Argument not reported.]

SHAW, C. J. This is an action on a promissory note payable to the plaintiff or order on demand. The declaration alleged it to be a note for three hundred dollars. On production of the note, the sum, as expressed in words, was "thee" hundred dollars, expressed in figures in the margin, \$300. The defences relied upon, and set out in the specification of defence, were: 1. Want of consideration; 2. Failure of consideration; and 3. Payment. The defendant also denied the execution of the note.

The questions in the case arise upon the correctness of the directions given by the judge, as stated in the bill of exceptions.

On the first point, we think the court rightly left it, as a matter of fact, for the jury; and that, if they found the word "thee" was intended for "three," by the defendant, when he signed, the plaintiff might recover. We see not how such a question could be otherwise disposed of. The maker certainly meant some number of hundred dollars; otherwise he intended an imposition and fraud, which cannot be presumed. Bad spelling will not vitiate, if the sound is the same. But because the sound slightly varies from that of any known number, we think it can hardly be said, that the instrument is void; but if not, the only alternative is to adopt the word to which it comes nearest. There is no other single word expressive of number, which could stand in its place, consistently with the sense of the sentence, to which it would be as near as to that of "three," or for which "thee" could have been erroneously used. If the Arabic numerals in the margin were manifestly in the same handwriting, and written at the same time, it would be a circumstance leading to the same result, if the other considerations were not alone sufficient.

It appearing on the declaration that the plaintiff had averred a

special demand, it was insisted by the defendant, that the plaintiff could not recover without proof of a special demand. But we are of opinion, that the court rightly instructed the jury, that such a demand was not necessary as a condition precedent to the maintenance of an action. Even in the old form of declaration, where the only duty from the defendant to the plaintiff was the payment of money, and the suit was to enforce such payment, the averment, "though often requested," was fully sustained by bringing the action, which was of itself a sufficient demand.¹

Perhaps, on a note like this, payable on demand, not expressed to be with interest, a specific demand should be averred and proved, at some time, if the holder seeks to charge the maker with interest, from any time anterior to the date of the writ.

On the subject of the burden of proof, the court are of opinion that the directions were precise and correct, and well adapted to the case. The court ruled, that the burden of proof was on the plaintiff to show that the note was given upon a valuable consideration, and if that was doubtful upon the whole evidence he could not recover; that proof of the execution of the note and its production in evidence made a *prima facie* case for the plaintiff, upon which they might find a verdict for him, unless, etc. This is strictly correct, but being expressed in technical terms, it may be useful to explain it a little. A promissory note is given "for value received;"² this is signed by the maker, and is an admission on his part that value has been received for it which is a good consideration. Its being produced by the holder is proof that after being signed it was delivered to the promisee, and is therefore evidence of a contract, on good consideration, between promisor and promisee, under the promisor's hand. But the law holds, and has long held, that, as between the original parties, such proof is not conclusive. It is therefore *prima facie* evidence, that is, it is competent evidence tending to prove a proposition of fact, and of course, if not rebutted or controlled by other evidence, will stand as sufficient proof of such proposition of fact. If, then, on a trial, when a note is sued for by the promisee against the promisor, the plaintiff produces and reads his note for value received, and the signature is admitted or proved, he has ordinarily no occasion to go further. He has the burden of proof to show a consideration; but he sustains that burden by his *prima facie* evidence, which, if not rebutted, stands as conclusive evidence.

This, though expressed in technical terms, is, we think, the common sense view taken of a promissory note by men of business, and reconciles the rules of law with the principles and practice of actual business. When a man takes a promissory note, for value received, promising to pay money to him or his order, he believes that he has

¹ Cf. *Estes v. Tower*, 102 Mass. 65, *post*, p. 83.

² Cf. N. I. L. § 23, 2.

a security complete in itself, and that he has no occasion to provide and preserve other evidence, to show the consideration on which it was given. And in a vast majority of cases the security is not only complete in itself, but is in fact conclusive, because no evidence can exist which will control and rebut such proof of consideration. But the law has further provided, that whilst the note remains as a contract between the original parties, that is, not transferred to another by indorsement, the consideration may be inquired into;¹ and therefore, if upon all the evidence in the case, whether offered by the plaintiff or the defendant, it appears that there was no consideration, or that the consideration has failed, by evidence sufficient to rebut the *prima facie* evidence arising from the signature and production of the note, it will constitute a good defence; and as the burden is on the plaintiff, to prove a good consideration, if the whole evidence, offered on both sides, leaves it in doubt whether there was a good consideration or not, the plaintiff fails of making out his case, and the defendant will be entitled to a verdict.

We have said that the evidence may come from either side. It may come from the plaintiff, as where an attesting witness or other person testifies that the note was given on settlement of an account, and on the production of the account by the plaintiff, it appears that there were so many mistakes and errors, that there was no balance due; and if the note was given for such supposed balance only, it will appear that the note was given without consideration. In general, the proof of want or failure of consideration must commence on the part of the defendant, after the production and proof of the note by the plaintiff, not because the defendant has the burden, or the burden of proof has shifted, but because the plaintiff has offered *prima facie* proof, sufficient to sustain the burden of proof on his part, unless it is rebutted and controlled by counter proof.

This view, we think, was expressed in the residue of the charge of the judge to the jury, that *prima facie* evidence would warrant a verdict for the plaintiff, unless the defendant introduced evidence, which either showed that the note was not given for a valuable consideration, or that the consideration failed, or evidence to render it doubtful in the minds of the jury whether the note was given on a valuable consideration, or the consideration failed, or not, and if not, or if the consideration had failed, the plaintiff could not recover.

When in the above sentence the learned judge used the phrase, "unless the defendant introduced evidence," we understand him to mean, as above stated, that after the production and proof of the signing of the note,² and after thus establishing a *prima facie* case,

¹ N. I. L. § 45.

² In many jurisdictions it is provided by statute that signatures need not be proved unless they are specially denied and proof is demanded. Cf. Rev. Laws of Mass. ch. 173, § 86.

the plaintiff would be entitled to a verdict, unless the defendant could show, from the whole evidence, want or failure of consideration, or leave the proof so doubtful, as to enable the jury to say, that the plaintiff had not satisfactorily proved a consideration.

The court further ruled, that the burden of proof is on the defendant to prove payment. The correctness of this has not been called in question, and is too obvious to require comment.

Exceptions overruled.

CHAPTER II.

DELIVERY.

[Delivery is the transfer of a thing, under or followed by circumstances such as to entitle the transferee to hold against the transferor.¹]

LYSAGHT v. BRYANT.

Court of Common Pleas of England, January, 1850. 9 C. B. 45.

Transfer is a question of control.

ASSUMPSIT. The first count of the declaration stated that the defendant, on the 7th of May, 1847, made his bill of exchange in writing, and directed the same to one Matthews, and thereby required the said Matthews to pay to his, the defendant's, order, the sum of £800, six months after the date thereof; that the defendant then indorsed the said bill to one James Lysaght and one William Smithett, who then indorsed the same to the plaintiff; and that Matthews did not pay the same, although duly presented, — of which the defendant had notice, etc.

Pleas, amongst others, — first, that the defendant had no notice of the dishonor of the bill by the drawee; secondly, that Lysaght & Smithett did not indorse the bill, in manner and form as in the first count alleged.

The cause was tried before WILDE, C. J., at the sittings in London after the last term. It appeared that James Lysaght and William Smithett had carried on business in partnership together, as East India merchants; and that the firm being indebted to the plaintiff, Admiral Lysaght, the father of James Lysaght, in the sum of £6000, James Lysaght, in July or August, 1847, with Smithett's concurrence, and in his presence, indorsed the bill in question to the plaintiff. To prove this, James Lysaght was called. He stated that, after he had so indorsed the bill, he held it as his father's agent, keeping it either in a separate part of the cash-box, or at his chambers in Regent Street. It did not appear that the fact of the indorsement had been communicated by the son to the father.

The bill was duly presented on the 10th of November, when it became due, but was not paid; whereupon Lysaght & Smithett, on the 11th of November, gave the defendant the following notice of dishonor:

¹ N. I. L. § 33.

"Sir, — We beg to inform you that your draft on Mr. Matthews, dated the 7th of May last, at six months' date, for £800, was duly presented, at, etc., for payment, when the answer given to the notary was, 'no effects.' The bill is now in our possession, and we require you to take it up immediately. Meanwhile, we request you to take notice, we do not release you from responsibility by holding it over.

Yours, etc.,

LYSAGHT, SMITHETT, & Co."

On the part of the defendant, it was proved that it was the custom of notaries in London to keep copies of all bills that pass through their hands, with all indorsements thereon, and that this practice was observed at the office of Duff, the notary by whom the bill was presented. And the notary's book was produced, and the clerk who entered the bill therein, called; and from these it appeared, assuming the entry to have been correctly made, that there was no indorsement by Lysaght & Smithett upon the bill at the time of its presentment.

It was then submitted that the notice of dishonor was insufficient.

The Lord Chief Justice reserving that point, left it to the jury to say whether the indorsement by Lysaght & Smithett was made before or after the bill arrived at maturity.

A verdict having been found for the plaintiff, Byles, Serjeant, pursuant to the leave reserved to him at the trial, moved for a rule *nisi* to enter the verdict for the defendant, or for a new trial on the ground that the verdict was against evidence.

[Argument reported.]

CRESSWELL, J. . . . Two questions arose in this case, — first, whether the defendant had received a sufficient notice of dishonor, — secondly, whether Lysaght & Smithett indorsed the bill before it became due. The decision of the first question depends in some degree upon the second; because, whether the notice was sufficient or not, may depend upon whether there was a proper indorsement. Mere writing on the back of the bill is not enough to constitute an indorsement; there must be a delivery, or something equivalent to a delivery, of the bill to the indorsee. Here the fact has been disposed of by the jury; and I think there was evidence enough to justify the conclusion they came to. James Lysaght swore positively that the bill was indorsed in the name and with the concurrence of the firm, in July or August; and he further stated, that ever since the indorsement it had been kept by him, as his father's agent, apart from the securities of the firm. That being so, it seems, from the cases, that the holder of a bill may avail himself of a notice of dishonor given in due time by a prior indorsee, provided he himself is in a condition to sue the party by whom the notice was given. Here, Lysaght the younger,

holding the bill as his father's agent, duly presented it, and had it returned to him dishonored. Notice of that fact to him, therefore, operating as notice to the firm, the present plaintiff was entitled to sue them, and, consequently, is in a condition to avail himself of the notice of dishonor given by them to the defendant.

MAULE, J., gave concurring opinion.

WILLIAMS, J., and WILDE, C. J., concurred.

Rule refused.

NOTE. — In *Purviance, Adm'r, v. Jones*, 120 Ind. 162, 164, it was said by Mitchell, J.: "While it is not indispensable that there should have been an actual, manual transfer of the instrument from the maker to the payee, yet to constitute a delivery it must appear that the maker, in some way, evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it and intentionally placing it under the power of the payee, or of some third person for his use." In that case the appellant's intestate was indebted to the appellee, Jones, and was requested by the latter to give him a mortgage as security for the amount. This the intestate refused to do, giving as a reason for his refusal, that he had signed a note for the amount payable to Jones, and had left it in a bank for the benefit of Jones. After the death of the intestate, the note was found among his private papers in the bank, of which the intestate was the president. There was no finding that the note had, in fact, been left with the bank for the benefit of the payee, Jones. The court held that there had been no delivery, as there was nothing to indicate that the intestate had surrendered control or that the note was within the power of the appellee, or of any person for his benefit. Cf. *Giddings v. Giddings's Adm'r*, 51 Vt. 227, *post*, p. 80.

BAXENDALE v. BENNETT.

Court of Appeal of England, July, 1878. L. R. 3 Q. B. D. 525.

Negligence of the promisor, followed by action thereon by the transferee, is such a circumstance; but the negligence must be the proximate cause of loss.

ACTION commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for £50 drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest.

At the trial before LOPES, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill, dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3d of June, 1872, and was the *bona fide* holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then put it into a drawer, which was not locked, of his writing-table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts, the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled, upon the authority of *Young v. Grote*, 4 Bing. 253, and *Ingham v. Primrose*, 7 C. B. N. s. 82; 28 L. J. C. P. 294, that the defendant was liable, and directed judgment to be entered for the plaintiff for £50 and costs.

[Argument reported.]

BRAMWELL, L. J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill; I am of opinion he

could not; but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he stopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of *Young v. Grote*, 4 Bing. 253, and *Ingham v. Primrose*, 7 C. B. N. s. 82; 28 L. J. C. P. 294, go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then, this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland v. Evans's Trustees*, 5 H. L. C. 389, shows under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument.

BRETT, L. J. In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody not a servant of the defendant stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the de-

fendant had been guilty of negligence and was therefore liable on the bill to the plaintiff. Bramwell, L. J., says that the defendant is not liable, because, if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover: he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable.¹ Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer; it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up.²

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in *Swan v. North British Australasian Company*, 2 H. & C. 175; 32 L. J. Ex. 273, there must be the neglect of some duty owing to some person — here how can the defendant be negligent who owes no duty to anybody — against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe

¹ N. I. L. § 31.

² Id. § 32.

any duty to any one, and secondly, he did not act otherwise than in a way which an ordinary careful man would act.

As to the authorities that have been cited: In *Schultz v. Astley*, 2 Bing. N. C. 544, the blank acceptance had been filled up by a stranger and a fraud had been committed; nevertheless, the acceptor was held to be liable. There, however, the acceptance had been issued and it was intended that it should be filled up by some one; but *Crompton, J.*, in *Stoessiger v. South Eastern Ry. Co.*, 3 E. & B. at p. 556, said that the case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham v. Primrose*, 7 C. B. N. s. 82; 28 L. J. C. P. 294, the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street, they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable because, said the court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing with it is to say we do not agree with it. In *Young v. Grote*, 4 Bing. 253, Young left a blank cheque with his wife, and in filling up the cheque for fifty pounds the word "fifty" was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word "fifty," the words "three hundred and" were inserted. Notwithstanding the forgery, the court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care; but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland v. Evans's Charity Trustees*, 5 H. L. C. 389, Parke, B., in delivering the opinion of the judges in the House of Lords, remarks, with reference to *Young v. Grote*, 4 Bing. 253, "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a person would not be liable and which govern the present case. "If a man should lose his cheque book or neglect to lock his desk in which it is kept and a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking

of *Young v. Grote*, 4 Bing. 253, says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer there must be something that amounts to an estoppel or ratification — “that the plaintiff was estopped from saying that he did not sign the cheque,” and then he says the doctrine of ratification is well illustrated by *Coles v. Bank of England*, 10 A. & E. 437. I think the observations made by the Lords in the case of *Bank of Ireland v. Evans’s Charity Trustees*, 5 H. L. C. 389, have shaken *Young v. Grote*, 4 Bing. 253, and *Coles v. Bank of England*, 10 A. & E. 437, as authorities.¹ In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, L. J., concurred that the judgment ought to be entered for the defendant.

Judgment for the defendant.

FEARING v. CLARK.

Supreme Court of Massachusetts, September, 1860. 16 Gray, 74.

So is the wrongful transfer of the instrument by a person intrusted therewith, such as a custodian or agent.

ACTION of contract on a promissory note for \$600, made by the defendant, dated July 4, 1857, and payable in one year after date to the order of one Joseph Lambrite and by him indorsed. The defendant in his answer denied the making and indorsement of the note declared on; but admitted that he signed such a note; and averred that he put it into the hands of third parties to be delivered to Lambrite, on the happening of contingencies which never did happen; and that neither the defendant nor those parties, nor any one else, by his authority or consent, ever delivered the writing to Lambrite, or to any other person as the defendant’s promissory note.

At the trial in the Superior Court, the plaintiff proved the signatures of the maker and indorser; and there was evidence that, on the 16th of July, 1857, the note was in Lambrite’s possession and was indorsed and delivered by him to the plaintiff as collateral security for the payment in six months of \$2000, of which \$900 was still due from Lambrite to the plaintiff at the time of the trial, and that the plaintiff took the note without any knowledge of the circumstances under which it was given.

ROCKWELL, J., allowed the defendant to introduce evidence of the facts alleged in his answer, against the objection of the plaintiff that they would constitute no defence to the action unless proved to have

¹ See *Scholfield v. Earl of Lonsborough*, 1896, A. C. 514, post, p. 449.

been known to the plaintiff when he took the note; and instructed the jury, "that if they should find that the writing copied in the declaration was never delivered by the defendant, or any person authorized by him so to deliver it, to the payee, or to any person for his use, but that he obtained possession of it without the assent or knowledge of or authority from the defendant, and, having obtained such possession without right or authority, put his name upon the back of it, and delivered it to the plaintiff, then and in that case it never became the negotiable note of the defendant, and the defendant was entitled to their verdict." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

[Argument not reported.]

BIGELOW, C. J. The defendant proved no facts at the trial which constituted a valid defence to the note declared on as against the plaintiff, who is a *bona fide* holder for value without notice. The rule is well settled, that when a note is transferred by a party to whom it is intrusted without authority or fraudulently, it will be valid as against the maker in the hands of a holder who takes it *bona fide* without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker, who puts it in circulation. In such case, the maker or indorser who places it in the hands of another, for the purpose of being used in a particular way or for a special object, takes the risk of its being used in a different way, and cannot refuse to pay it to any *bona fide* holder into whose hands it may come. Chit. Bills (10th ed.), 198; Sweetser v. French, 2 Cush. 309. It is undoubtedly true that, as between the original parties to a note or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case, a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of Putnam v. Sullivan,¹ 4 Mass. 45, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practised on him, or a voluntary violation of the trust reposed in him, must be deemed in law, as against a *bona fide* holder, a delivery by those who are liable on the notes. The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery

¹ Post, p. 404.

is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences, which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are intrusted by the makers, to fall on those who enabled them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value without notice.

Exceptions sustained.

NOTE. — It is to be observed that, while the facts in this case make a case of agency, and that the person to whom the instrument was transferred by the maker was more than a custodian, the language of the court is not confined to agency in the common-law sense. This is sound theory; common-law rules are not the test, and another reason exists for liability, i. e. the merchants' reason, — "protection of the *bona fide* holder." See Bigelow, Bills and Notes, 14.

It has been said, however, that delivery by a custodian, that is, by one whose duty was merely to keep the instrument, could not bind the promisor. *Chipman v. Tucker*, 38 Wis. 43.

GIDDINGS *v.* GIDDINGS'S ADM'R.

Supreme Court of Vermont, October, 1878. 51 Vt. 227.

There may be a transfer upon some condition which requires fulfillment in order to give the transferee full power,¹ whether the transfer be to a third person.

THIS was an appeal from probate. The case was sent to a referee who reported the facts, and judgment was entered for the plaintiff for one-third of the sum of \$375.20 with interest; to which both parties excepted. The facts appear sufficiently in the opinion of the court.

[Argument reported.]

ROYCE, J. . . . The first question in the consideration of the case, and the most important in the view we take of it, is as to the delivery of the note in suit. Benjamin Giddings, defendant's intestate, and his brother Joseph, met in 1867, and in conversation Benjamin admitted that he considered he ought to make good to Joseph, or to those who would have his estate, his (Joseph's) share in their mother's dower estate, which had never been claimed by Joseph, and on which the Statute of Limitations had then run, and which the

¹ N. I. L. § 33.

referee finds was worth, on the first of January, 1866, "as near as can now be ascertained," \$375.20. In consideration of this, and certain good but not valuable considerations, Benjamin afterwards executed three promissory notes in writing for the sum of \$500 each, payable one to each of Joseph's three sons respectively, one year after the maker's death, one of which notes is declared upon as the cause of action in this suit. He intended, as the referee finds, to leave these notes in the hands of some third person, subject to his own control, to be delivered after his death, if he should not retake them or direct otherwise. He informed Joseph and each of the payees of his intention, as above, and they all assented to the arrangement. After that he put the notes into a letter envelope and sealed it up, and wrote on it this address: "Henry F. Giddings, of Ellisburg, Jefferson County, N. Y., and others, in care of Barnes Frisbie, Esq., of Poultney," and delivered it to Barnes Frisbie of Poultney, at Poultney, with directions about the custody of it, which Frisbie, as the referee finds, indorsed correctly, in substance, on a wrapper that he put around it, in these words: "Letter left in my care by Benj. Giddings, to be handed to Mr. Giddings if he calls for it; otherwise not to be opened in his lifetime." Benjamin did not retake the package; and after his death in 1873, Frisbie opened it, and delivered the notes respectively to the payees named in them, — this plaintiff and Henry F. and Benjamin F. Giddings, his brother.

In *Belden v. Carter*, 4 Day, 66, A, having signed, sealed, and acknowledged a deed of certain lands to B, gave the deed, in the absence of B, to C, saying: "Take this deed and keep it; if I never call for it, deliver it to B after my death; if I call for it, deliver it up to me." A died without retaking the deed, and C delivered it to B. Held, that the delivery became complete and took relation back to the first delivery. In *Worth v. Case*, 42 N. Y. 362, a note remained in the hands of the payee until the death of the maker, being received and held by him subject to the condition that it should be returned to the maker whenever he might wish it during his lifetime; and the note was held valid. And in *Foster v. Mansfield*, 3 Met. 412, it is laid down that if a grantor directs and intends that his deed from and after its execution shall be retained by the scrivener until after the grantor's death and then delivered to the grantee, all of which if afterwards done, the estate vests in the grantee from the time of the execution of the deed. On the authority of these cases, and the principles of law upon which they were decided, it seems clear that had Benjamin handed the notes to Frisbie with specific instructions, as in *Belden v. Carter*, *supra*, the delivery would have been sufficient, and on the death of the maker, with the option of recall unexercised, and the actual receipt of the notes by the payees, would have become complete and taken effect back by relation to the time of the deposit of the notes with Frisbie. Were the acts and

words of Benjamin and the understanding and treatment thereof by all the parties, as shown by the referee's findings, equivalent to such a specific direction?

Upon the part of the defendant it is contended that the acts of the maker simply constituted Frisbie a depositary of the notes for him, with no authority to deliver them to the payees in any event; and that whatever agency he might have been invested with to deliver them upon further instructions was revoked by the death of Benjamin. In order to accept this construction, it is necessary to reject as meaningless the direction written by Benjamin upon the envelope containing the notes, and to declare unjustifiable the acts of Frisbie based upon his understanding of the meaning of that direction. The policy of the law is to give effect to all the acts and words of parties, when it can be done without repugnancy.

In the case at bar the payees of the three notes in terms assented to their delivery to some third person by the maker, who should hold them subject to an option of recall by the maker during his life, and then complete the delivery by handing them over to the payees; also that the selection of such third person should be left to the maker. In pursuance of this arrangement Benjamin selected Frisbie as such third person, and handed the notes over to him with oral directions concerning the option of recall, and written directions, in the form of an address upon the envelope, in precisely the terms ordinarily used in delivering papers or goods through the agency of a carrier, for their delivery to the payees, in case he should die with the option of recall unexercised. From this direction Frisbie, as evinced by his acts, understood, as any intelligent person would have done, that if Giddings died without reclaiming the packet, he was to deliver it — not to Giddings's personal representatives, in the absence of any instructions written or oral to that effect — but to the parties to whom it was so addressed, viz., "Henry F. Giddings and others." Benjamin did die without calling for the packet, and thereupon Frisbie, for the purpose of ascertaining who were meant by the word "others," assumed to open it, and delivered the notes to the several payees named therein. Had Frisbie been on the eve of a journey to Ellisburg, and had Benjamin handed him this packet without a word, the legal construction of the act would have been: "Deliver this package to the parties to whom it is addressed unless I exercise the right I possess by implication to direct you otherwise before the commission is executed." In this case, the right to countermand the direction upon the envelope was extended by oral reservation to cover the whole period of Benjamin's life; but the principle remains the same, and the delivery, having been completed, will not be disturbed. There was a perfect consonance in the proved intentions of the parties and the manner in which they were carried out. The precise intention

of Benjamin with regard to the notes, as found to have been expressed by him to his brother and three nephews, was gathered by Frisbie from the oral and written directions of Benjamin to him, and from no other source, and carried out by him to the letter. We find in this whole transaction all the elements which in law are held to constitute a valid delivery through an agent, — that Frisbie received the note in suit as agent for the payee, subject to an option of recall by the maker, in like manner as a carrier receives goods as the agent of the consignee, subject to the option of the consignor to stop them *in transitu*, held it as trustee for the payee, and, having completed the delivery in accordance with the direction upon the envelope and the intention of all the parties, it took effect back by relation to the original deposit with him, and constituted a full and complete delivery on that date.

The defendant seeks to avoid the note upon the further ground of want or inadequacy of consideration. The case shows that Joseph originally had a legally enforceable claim for his distributive share in his mother's dower estate, that said claim was never presented nor enforced by him, and that the interest was possessed and enjoyed with his tacit consent and permission, by Benjamin. "The defendant's having received a benefit by the permission of the plaintiff, is a good consideration." *Davis v. Morgan*, 6 D. & R. 42; 4 B. & C. 8. So also is an outlawed legal claim. *Hawley v. Farrar*, 1 Vt. 420; *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Lee v. Muggridge*, 5 Taunt. 37; *Smith v. Jameson*, 5 T. R. 601; *Esp. N. P.* 116; *Bull. N. P.* 147; *Barlow v. Smith*, 4 Vt. 139, 144; *Glass v. Beach*, 5 Vt. 172; *Boothe v. Fitzpatrick*, 36 Vt. 681. That the consideration for the note was a certain specific outlawed claim, and less in amount than the face of the note, is immaterial in the absence of fraud or mistake upon the part of either of the contracting parties. In *Oakley v. Boorman*, it is said: "A promise or obligation cannot be defeated in whole or in part, on the ground of the inadequacy of the compensation received for the obligation incurred — the slightest consideration is sufficient to support the most onerous obligation; the meaning of the rule that you may impeach the consideration is only that you may show fraud, mistake, or illegality in its concoction, or non-performance of the stipulations of the agreement on the part of the promisee." 21 Wend. 588. Contracts entered into by parties knowing their rights, though upon inadequate consideration, will not be set aside in law. *Harrington v. Wells*, 12 Vt. 505; *Paige v. Ripley*, 12 Vt. 289; nor in equity, *Stephens v. Bateman*, 1 Bro. C. C. 22; *Griffith v. Spratley*, 1 Cox, 383; *Collin v. Brown*, 1 Cox, 428. Family agreements are especially favored in this respect. *Stockley v. Stockley*, 1 Ves. & B. 23; being based upon good as well as valuable considerations. *Persse v. Persse*, 7 Cl. & F. 279; 1 West, 110.

The defendant claims that if any recovery can be had in this

action, it should be only for the amount found by the referee to be the actual value at the time the note was given, of one third of Joseph's share of the dower interest. It seems to be well settled that to entitle a defendant to an abatement from the sum for which the note was given, in a case of this kind, two things at least must concur, viz., fraud upon the defendant in procuring the note for the sum named, or, at least, a failure of the consideration from the understanding of the parties at the time, and an ability by computation to fix the amount to be deducted. *Walker v. Smith*, 2 Vt. 539; *Stone v. Peake*, 16 Vt. 213; *Harrington v. Wells*, 12 Vt. 505; *Harrington v. Lee*, 33 Vt. 249. Both of these elements are lacking in the case at bar. No fraud is alleged and no misunderstanding about or failure in the consideration. And it is not found with certainty what the actual value of Joseph's share in the dower estate was at the time the notes were given; nor is it found affirmatively that in the settlement the fifty years' use and the purchase-money of Joseph's distributive share of the farm, for which Joseph once had a legal claim against the estate of his father, and which inured, at least partially, to the benefit of Benjamin, were not taken into consideration as forming a part of the consideration of the notes. Upon such facts as these it would be extremely hazardous, to say the least, to undertake to reduce written contracts or promises to a *quantum valebat*.

Judgment reversed, and judgment for plaintiff on the report for the larger sum named, with interest and costs; to be certified to the Probate Court.

BURKE v. DULANEY.

Supreme Court of the United States, April, 1899. 153 U. S. 228.

Or to the other party to the instrument.

ACTION by the testator of the appellees, upon a writing purporting to be the promissory note of the appellant for \$4308.80, dated Aug. 10, 1883, and payable one year after date, for value received.

The defendant below, Burke, denied his liability on the note and offered to prove that the note was given to the testator of the appellees for an interest in certain mines, and that at the time of giving the note, it was orally agreed that the note was delivered upon condition that if the maker, Burke, was not satisfied after an inspection of the mining property mentioned, the payee, Dulaney, would deliver back the note; that he, Burke, demanded the note, after inspecting the property, and offered to Dulaney a deed of the interest.

This evidence was objected to by the plaintiffs below and was excluded by the court, and the defendant below excepted.

[Argument reported.]

Mr. Justice HARLAN. The general rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract, has been often recognized and applied by this court, especially in cases in which it was sought to deprive *bona fide* holders of or parties to negotiable securities, of the rights to which they were entitled according to the legal import of the terms of such instruments. *Renner v. Bank of Columbia*, 9 Wheat. 576, 587; *Brown v. Wiley*, 20 How. 442; *Specht v. Howard*, 16 Wall. 564; *Forsythe v. Kimball*, 91 U. S. 291; *Brown v. Spofford*, 95 U. S. 474; *Martin v. Cole*, 104 U. S. 30; *Burnes v. Scott*, 117 U. S. 582; *Falk v. Moebs*, 127 U. S. 597.

Several of these cases were cited in the opinion of the court below, and have been cited here, as supporting the exclusion of the evidence which the appellant offered to introduce. 23 Pac. Rep. 915. It is supposed that *Burnes v. Scott* is particularly in point for the appellees. That was an action by the indorsee of a negotiable note against the maker. The defendant in that case offered to prove that the note was not intended by him or by the payee as a promissory note, but was given to and was received by the payee as a mere memorandum of the estimated value of the payee's interest in certain railroad bonds placed in the hands of the maker, and which were to be accounted for in the settlement of certain partnership affairs in which the maker and payee were interested; and that upon such settlement it would appear that the payee had received, prior to the giving of the note, more than his proper share of the partnership assets, and, therefore, was not entitled to claim anything in virtue of such memorandum. This court held the evidence inadmissible upon the ground that, by an alleged contemporaneous verbal agreement, it varied and contradicted the written contract of the parties. If that action had been brought by the original payee against the maker, and if the evidence above referred to had been excluded, a different question would have been presented. But, as we have seen, the issue in *Burnes v. Scott* was between the indorsee of a negotiable note and the maker. The rule is settled that a negotiable instrument in the hands of an innocent holder for value cannot be contradicted, to his prejudice, by evidence of an oral agreement or understanding between the original parties variant from the terms of their written contract.

The authorities cited do not determine the present case. The issue here is between the original parties to the note. And the evidence offered by the appellant, and excluded by the court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination

or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not — except in a named contingency — to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is, undoubtedly, *prima facie*, [and] indeed, should be deemed strong, evidence that the instrument came to the hands of the payee as an obligation of the maker, enforceable according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing as the promissory note of the maker, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract.

The same doctrine was announced in *McFarland v. Sikes*, 54 Conn. 250, 251, 252. That was an action upon a note, which, the defendant alleged, had been executed and delivered to the plaintiff upon an agreement that it should be cancelled under certain named circumstances, and in the event he demanded, by a named day, that it be returned to him. The trial court having ruled that the facts relied upon by the defendant did not constitute a defence, the Supreme Court of Errors of Connecticut, reversing the judgment, said: "The error was in applying to the case the familiar and well-established rule that parol evidence is inadmissible to contradict or vary a written contract. A written contract must be in force as a binding obligation to make it subject to this rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *prima facie* evidence that it had been delivered; but it would be only *prima facie* evidence. The fact could be shown to be otherwise and by parol evidence. Such parol evidence does not contradict the note or seek to vary its terms. It

merely goes to the point of its non-delivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them."

For the reasons stated, and without considering the case in other respects, we are of opinion that it was error to exclude the evidence offered by the defendant tending to show that the writing sued on was not delivered to or received by Dulaney as the promissory note of the defendant, binding upon him as a present obligation, enforceable according to its terms, but was delivered to become an obligation of that character when, but not before, the defendant examined and, by working them, tested the mining properties purchased by the plaintiff, and elected to take the stipulated interest in them. According to the evidence so offered and excluded the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what Burke was to pay in the event of his electing to become interested in the property, and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election, within a reasonable time, to take such interest, was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis, and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves.

The judgment is reversed and the cause is remanded, that a new trial may be ordered, and further proceedings had in conformity with this opinion.

NOTE. — There is not entire unanimity in the decisions upon the question whether there can be a conditional delivery to the payee. In *Gardner v. Fite*, 93 Ala. 405, 9 So. R. 367, it was said by Walker, J.: "It is not competent to prove that a bill or note was delivered to the promisee as an escrow, for the evidence would be repugnant to the act. *Massmann v. Holscher*, 49 Mo. 87; *Jones v. Shaw*, 67 Mo. 667; . . . *Hargrave v. Melbourne*, 86 Ala. 270; 1 *Daniel*, Neg. Inst. § 68; . . . As the notes themselves expressed no conditions limiting their operation, they were legally incapable of explanation, contradiction, or modification by parol evidence. *Day v. Thompson*, 65 Ala. 269." But the weight of authority is against this view. See *Benton v. Martin*, 52 N. Y. 570; *Clanin v. Esterly Co.*, 118 Ind. 372; and *Wilson v. Powers*, 131 Mass. 539. If it is admitted that the parol evidence rule is applicable to commercial paper, it is no obstacle in such a case. To make a binding obligation, there must exist the written contract and a delivery thereof; the parol evidence rule applies only to the former.

If the question were referred to the custom of merchants, there can be no doubt as to the reply.

WOOD'S SONS CO. v. SCHAEFER.

Supreme Court of Massachusetts, March, 1899. 173 Mass. 443; 53 N. E. Rep. 881.

But not if the condition negatives possible liability.

CONTRACT, upon a promissory note for \$2,500, dated June 19, 1896, payable four months after date to the plaintiff, or order, and signed by the defendant. At the trial in the Superior Court, before BRALEY, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

[Argument not reported.]

HOLMES, J. This is an action upon a promissory note. The defence is a denial that the transaction was what it appeared to be on the face of the papers. There is also a claim in set-off for services as president of the plaintiff corporation. At the trial, the plaintiff's evidence was that the plaintiff discounted for the defendant a note, of which the note in suit is a renewal, giving a cheque for fifty dollars less than the note and receiving twenty-five shares of the Corson Coal Company as collateral security as soon as the defendant was able to release them from a previous pledge by the money thus obtained. The note and the certificate indorsed in blank by the defendant were produced, and the execution of the instrument was not denied. The defendant testified that, in view of services which he had rendered to the plaintiff, Edmund M. Wood, its treasurer and manager, agreed to buy the twenty-five shares of him, and gave him the cheque as payment for them, and that the defendant, to enable Wood "to square himself with his own corporation," from which the money came, gave Wood "the use of" the original of the note in suit with the shares as collateral security, Wood promising to take care of it when it should fall due. The judge left it to the jury to say whether the defendant's story was true, and instructed them to find for him if they accepted it. They found for the plaintiff.

It would be hard to say that the course adopted did not save all the defendant's rights if the alleged agreement had been proved, although the instructions were not so specific as those asked. It really gave the defendant quite as good a chance to prevail upon his improbable story. But it is plain, further, that even on the defendant's account Wood's agreement was collateral and personal. The defendant's note was to be given to the company in order to justify Wood's draft upon it to pay for the shares. If the defendant did not contemplate a fraud on the company, the company was entitled to enforce the note, although Wood promised on his own behalf that he would forestall its doing so by paying it. Finally, if the defendant's

counsel, contrary to the plain meaning of the defendant's evidence, wanted to contend that Wood's agreement was an agreement by the company not to enforce the note according to its tenor, such an agreement made at the time the note was delivered is in flat contradiction of the instrument, and cannot be proved. *Perry v. Bigelow*, 128 Mass. 19; *Hall v. First National Bank of Chelsea*, 173 Mass. 16.

[A question of set-off.]

Exceptions overruled.

NOTE. — Following up the principle of delivery upon condition to the other party to the instrument, it has been held that it may be shown that the transferor, in delivering the instrument to the transferee, did so upon the condition that no liability was to be incurred thereon. Thus in *Higgins v. Ridgway*, 153 N. Y. 180, which was an action by the receiver of the North River Bank, upon a promissory note, made by the defendant payable to his own order, and indorsed by him to the bank, the defendant proved that he made and indorsed the note for the accommodation of the bank, upon the condition that he was to incur no liability upon it. It was held "that the delivery of the note in suit . . . was conditional and was for the accommodation and to serve some particular purpose of the bank." The evidence of the defendant in this case was clearly admissible to show a want of consideration; but in cases where there is consideration, it seems that evidence that the instrument was delivered on condition that the defendant was not to incur any liability thereon, is contradictory and repugnant to the act of delivery. Cf. *Perry v. Bigelow*, 128 Mass. 129; *Bigelow, Bills and Notes*, 16.

CHAPTER III.

FORM AND REQUISITES.

GAY *v.* ROOKE.

Supreme Court of Massachusetts, January, 1890. 151 Mass. 115;
28 N. E. Rep. 835.

A negotiable promissory note must contain a promise.¹

CONTRACT on the following instrument, declared on as a promissory note: "Marlboro', Sept. 23, 1881. I. O. U., E. A. Gay, the sum of seventeen dolls. $17\frac{1}{10}$ for value received. John R. Rooke."

Writ dated September 19, 1887. At the trial in the Superior Court, without a jury, before DEWEY, J., the only issue was whether the plaintiff was entitled to interest from the date of the instrument, or from that of the writ, the service of which was the only demand made by the plaintiff.

The plaintiff asked the judge to rule, as a matter of law, that he was entitled to interest from the date of the instrument. The judge declined so to rule, and ruled that interest could be recovered from the date of the writ only, and found for the plaintiff for \$17.05 only; and the plaintiff alleged exceptions.

[Argument not reported.]

DEVENS, J. In order to constitute a good promissory note there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law, founded on an acknowledged indebtedness, will not be sufficient. Story, Prom. Notes, § 14; Brown *v.* Gilman, 13 Mass. 158. While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom. Commonwealth Ins. Co. *v.* Whitney, 1 Met. 21. In this view the instrument sued on cannot be considered a promissory note. It is an acknowledgment of a debt only, and, although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt, and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. It was therefore

¹ N. I. L. § 18.

held in *Gray v. Bowden*, 23 Pick. 282, that a memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and due," signed by the maker and attested by a witness, was not a promissory note signed in the presence of an attesting witness within the meaning of the statute of limitations. In England an I. O. U., there being no promise to pay embraced therein, is treated as a due bill only. The cases, which arose principally under the stamp act, are very numerous, and they have held that such a paper did not require a stamp, as it was only evidence of a debt. 1 Danl. Neg. Instr. (3d ed.) § 36; 1 Randolph, Com. Paper, § 88; *Fesenmayer v. Adcock*, 16 M. & W. 449; *Melanotte v. Teasdale*, 13 M. & W. 216; *Smith v. Smith*, 1 F. & F. 539; *Gould v. Coombs*, 1 C. B. 543; *Fisher v. Leslie*, 1 Esp. 425; *Israel v. Israel*, 1 Camp. 499; *Childers v. Boulnois*, Dowl. & Ry. N. P. 8; *Beeching v. Westbrook*, 8 M. & W. 411.

While in a few States it has been held otherwise, the law, as generally understood in this country, is, that, in the absence of any statute, a mere acknowledgment of a debt is not a promissory note, and such is, we think, the law of this Commonwealth. *Gray v. Bowden*, 23 Pick. 282; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21; *Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342; *Carson v. Lucas*, 13 B. Mon. (Ky.) 213; *Garland v. Scott*, 15 La. An. 143; *Currier v. Lockwood*, 40 Conn. 349; *Brenzer v. Wightman*, 7 Watts & Serg. 264; *Biskup v. Oberle*, 6 Mo. App. 583. Some States have by statute extended the law of bills and promissory notes to all instruments in writing whereby any person acknowledges any sum of money to be due to any other person. 1 Randolph, Com. Paper, § 88; Rev. Sta. Ill. 1884, c. 98, § 3; Gen. Sta. Col. 1883, c. 9, § 3; Rev. Sta. Ind. 1881, § 5501; Code, Iowa, 1873, § 2085; Rev. Code, Miss. 1880, §§ 1123, 1124.

We have no occasion to comment upon those instruments in which words have been used or superadded from which an intention to accompany the acknowledgment with a promise to pay has been gathered, or where the form of the instrument fairly led to that conclusion. *Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342. No such words exist in the instrument sued [on], nor is it in form anything but an acknowledgment. The words "for value received" recite indeed the consideration, but they add nothing which can be interpreted as a promise to pay. It is therefore unnecessary to consider whether, if the paper were a promissory note, interest should be calculated from its date. Upon this point we express no opinion. If it is to be treated as an acknowledgment of debt only, as we think it must be, the plaintiff is not entitled to interest except from the date of the writ. Even if it was the duty of the defendant to have paid the debt on demand, yet if no demand was made, if no time was stipulated for its payment, if there was

no contract or usage requiring the payment of interest, and if the defendant was not a wrongdoer in acquiring or detaining the money, interest should be computed only from the demand made by the service of the writ. *Dodge v. Perkins*, 9 Pick. 368; *Hunt v. Nevers*, 15 Pick. 500. "In general," says Chief Justice Shaw, "when there is a loan without any stipulation to pay interest, and where one has the money of another, having been guilty of no wrong in obtaining it, and no default in retaining it, interest is not chargeable." *Hubbard v. Charlestown Railroad*, 11 Met. 124; *Calton v. Bragg*, 15 East, 222; *Shaw v. Picton*, 4 B. & C. 715; *Moses v. Macferlan*, 2 Burr. 1005; *Walker v. Constable*, 1 Bos. & P. 306.

Exceptions overruled.

WHEATLEY v. STROBE.

Supreme Court of California, January, 1859. 12 Cal. 92.

A bill of exchange, an order.¹

ASSUMPSIT to recover a sum of money owed by the defendant to the plaintiff. Defence, that the plaintiff owed one H, and to pay his debt to H, the plaintiff drew the following order on the defendant, which was presented by H to the defendant and verbally accepted by him.

"SAC CITY, July 18, 1857.

Mr. STROBE: Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account.

E. D. WHEELER."

The plaintiff demurred; demurrer sustained and the defendant appealed.

[Argument reported.]

FIELD, J. Upon the facts in this case the appellants make two points: *First*. That the verbal acceptance of Strobe was sufficient to render him liable to H upon the order of Wheatley. . . . The first of these points cannot be sustained. The order possesses all the requisites of an inland bill of exchange. It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified, it is to be taken as payable at sight.² No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "please" does not alter the character of the instrument. This is the usual term of civility, and

¹ N. I. L. § 18.

² Apparently a slip for on demand.

does not necessarily imply that a favor is asked. (Story on Bills, sec. 33 and notes; 3 Kent, 74.)

The order being a bill of exchange, the written acceptance of Strobe was necessary to charge him as acceptor under the statute. His verbal acceptance was insufficient. (Act concerning Bills of Exchange, sec. 6.) Upon the order, therefore, he is not liable. . . .

Judgment reversed.

QUINBY v. MERRITT.

Supreme Court of Tennessee, December, 1850. 11 Humph. 439.

For the payment of money.¹ [It must not be payable in the disjunctive.²]

THE case is stated in the opinion.

[Argument not reported.] .

TOTTEN, J. The action is founded on an obligation executed by the defendant to Susan Quinby, on the 29th October, 1842, by which he agreed to pay to Susan Quinby one hundred and forty dollars in carpenter's work, and upon said obligation are the following indorsements, to wit: "Pay the within to the order of C. W. or W. L. Nance," signed "Susan Quinby;" "I assign the within to Wm. Warmouth, without recourse on me, Oct. 14, 1846," signed "C. W. Nance."

His honor the judge instructed the jury "that if the paper in suit was assigned to C. W. or W. L. Nance, the assignment of one of them would not transfer the paper; but if both had assigned it, the word 'or' would be construed 'and,' to effectuate the intention of the party." The verdict was of course for the defendant, and the only question is, whether there was error in the instruction to the jury; and we are of the opinion that there was not.

As to the character of the instrument, we may observe that it is not a negotiable paper in the sense of the law merchant; though by statute (1801, ch. 6, § 54) such a contract is assignable so as to transfer the legal interest and to enable the assignee to sue in his own name. *Whiteman v. Childress*, 6 Humph. 309.

The case of *Willoughby v. Willoughby*, 5 N. H. 244, was an action by one of the payees on a note payable to Washington or Joseph Willoughby, and the court was of opinion that the note was evidence of a contract with both the payees jointly; that "or" in the note must be understood to mean "and;" and therefore that one of the payees could not maintain the suit without joining the other.

In *Blanckenhagen v. Blundell*, 2 Barn. & A. 417, and *Walrad*

¹ N. I. L. § 18.

² Cf. N. I. L. § 25.

v. Petrie, 4 Wend. 575, the notes were made payable to two persons in the disjunctive, and a similar view of the subject was taken. But these cases are principally to the point that such a note is not valid as a promissory note, because of the uncertainty of the person entitled to the payment; and certainly that is to be taken as the settled doctrine as to promissory notes, made negotiable, as under the law merchant. Story on Prom. Notes, § 33.

The case of *Ellis v. McLemood*, 1 Bailey (S. C.), 13, maintains a different rule, and decides that one of the payees of a note may alone maintain the action, because it is made payable to either. This case must be considered as standing opposed to the weight of authority on this subject, and we are by no means satisfied with the principle it holds or the reasoning employed to maintain it.¹

Although such paper be not valid as a promissory note, yet it is evidence of a contract for the payment of money, and, according to the cases referred to, and especially that in 5 N. H., it is evidence with both the payees jointly; and they have therefore a joint interest in the fund secured by such note.

If this view of the subject be not correct, then the note or other contract so made payable to two or more in the disjunctive should be taken as void for uncertainty, as we do not see that any one of the payees can have a better claim than another to sue upon the note or contract, or demand its payment. It is true that a payment to any one of them would be a discharge of the contract; but that is also true when the note or contract is made payable to two or more persons jointly; a payment to one is a payment to all, although they have a joint interest in the fund.

We think it more conformable to reason as well as authority to hold such a contract as valid, and as conferring a joint interest on the persons with whom it is made, and who are entitled to its proceeds. Now to apply this principle to the present case, the assignment to "C. W. or W. L. Nance" will be construed as conferring upon them not a separate but a joint interest in the contract, that being the intention as well as legal effect; and as only one of them has assigned to the plaintiff, it follows that the plaintiff is not invested with the legal title to the contract, and therefore cannot maintain an action upon it. It certainly was competent for him, as the owner of this obligation, to strike out the assignments, they being imperfect, and to sue in the name of the payee for his use; but as he relies upon the assignments, and they do not transfer the legal title, the present action cannot be maintained. Let the judgment be
Affirmed.

¹ See *Osgood v. Pearsons*, 4 Gray, 455; *Bigelow, Bills and Notes*, 14.

COTA v. BUCK.

Supreme Court of Massachusetts, March, 1840. 7 Met. 588.

Absolutely and at all events.¹

INDEBITATUS ASSUMPSIT on the common money counts. Plea, the general issue. Trial in the Court of Common Pleas.

The plaintiff, to maintain the issue on his part, offered in evidence the following instrument: "New Ashford, March 13th, 1840. For value received, I promise to pay John Pero, or bearer, five hundred and seventy dollars and fifty cents, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said Pero, which is to be paid in the course of the season now coming. Bushrod Buck."

The defendant objected that this instrument was not a negotiable note, and therefore could not be given in evidence by the plaintiff in this action brought in his own name. The court decided that the instrument was a negotiable note transferable by delivery, and it was given in evidence to the jury, who returned a verdict thereon for the plaintiff. The defendant alleged exceptions to said decision.

[Argument reported.]

SHAW, C. J. The true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund or upon a contingent event. If it were payable on a contingency, or out of a particular fund, it would not be negotiable. This note, we think, was payable by the promisor at all events, and within a certain limited time. The note is obscurely written and ungrammatical. But we think the meaning was this; that the signer, for value received in the purchase of property, promised to pay Pero or bearer the sum named, as soon as the termination of the coming season, and sooner, if the amount could be sooner realized out of the fund. Such reference to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute, and did not depend on the fund. So as to the time, whatever time may be understood as the "coming season;" whether harvest time or the end of the year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment.²

Exceptions overruled.

¹ N. I. L. § 18, 2.

² Cf. *Way v. Smith*, 111 Mass. 523; *Stults v. Silva*, 119 Mass. 137; N. I. L. § 21, 2. See note to *Mattison v. Marks*, *post*, p. 53.

HASKELL v. LAMBERT.

Supreme Court of Massachusetts, November, 1880. 16 Gray, 592.

And not upon any contingency.¹

CONTRACT by the plaintiff as indorsee against the defendant as second indorser of the following instrument:

"Boston, January 4th, 1850. Six months after date I promise to pay to the order of myself twenty-four hundred dollars, value received, to be held as collateral security for the payment of E. Boynton's note, December 5th, 6 months for \$968.41; P. E. Webster's note, September 7th, 6 months for \$257.72, and his acceptance, December 11th, 6 months for \$178.10; M. Bartlett & Co.'s note, May 7th, 6 months for \$435.40; Wm. M. Jackson's note, November 5th, 6 months for \$562.59.
GEORGE LAMBERT."

No objection was made in the answer to the form of the note; but at the trial in the Superior Court of Suffolk at May term, 1859, MORTON, J., ruled that if all the facts necessary to make out his case were proved, the plaintiff could not maintain this action, because the instrument declared on was not a negotiable promissory note. Verdict for the defendant; the plaintiff alleged exceptions.

[Argument not reported.]

BIGELOW, C. J. The contract declared on is in legal effect a promise to pay a sum of money in six months after its date if certain debts enumerated in it are not paid by the persons liable therefor. It is therefore not an absolute promise to pay money at all events, but only upon a contingency. Nor is it certain as to the sum which will be payable at its maturity. Being given as collateral security for certain specified debts, for which different persons are liable, the payment of any portion of such debts will reduce the amount *pro tanto* for which the defendant can be held upon his promise. It is therefore an agreement to pay the whole sum in a certain contingency, or such part thereof as may not be paid by certain other persons. In these particulars it lacks the essential qualities of a promissory note. It is a contingent promise, and the sum which will be due upon it at the expiration of six months is uncertain. A promise to pay money, not certain as to amount, and contingent upon a future event, is not regarded as negotiable, because it carries with it on its face notice of the contingency or uncertainty, and the holder or assignee must be bound by the stipulation, and must take it subject to all the equities. Although he may have paid full value for it, he cannot enforce it except on the pre-

¹ N. I. L. § 18, 2.

scribed contingency or for the amount which may at its maturity turn out to be due. Besides, it would essentially infringe on an established and salutary rule of law to hold a conditional or contingent promise to pay money valid, without requiring proof of consideration. The case at bar is very similar to *Robins v. May*, 11 Ad. & El. 213, and 3 P. & Dav. 147. See also *Byles on Bills* (6th ed.), 71; *Cota v. Buck*, 7 Met. 589.

The contract not being negotiable, and there being no proof of any express promise by the defendant to pay to the plaintiff the amount of the note or any part of it, it is clear that the present action cannot be maintained, and that no amendment of the declaration can be made under which the plaintiff would be entitled to recover.

Exceptions overruled.

SCHMITTLER v. SIMON.

Court of Appeals of New York, March, 1886. 101 N. Y. 554.

Nor out of a particular fund.

ACTION by the indorsee against the acceptor of a bill of exchange. The facts are stated in the opinion.

[Argument reported.]

RUGER, C. J. The plaintiff claimed to recover as the holder of a draft, drawn upon and accepted by the defendant, reading as follows:

“NEW YORK, February 26, 1877.

Mr. Adam Simon, executor, will please pay to Johannes Schmittler or his order on the first day of July, which will be in the year of 1879, the sum of \$900, with seven per cent interest, to be paid besides this amount yearly, July month, and charge the amount against me and of my mother's estate.

WILLIAM J. SCHAREN.”

Written upon the face: “Accept, Adam Simon, executor,” and indorsed: “Pay to the order of Mary Schmittler, the amount of note. Johannes Schmittler.”

Upon the trial, after proving the execution of the draft, its acceptance and transfer, and offering to prove the payment of a consideration by the plaintiff to the payee, which was objected to by the defendant, and excluded by the court, the plaintiff rested. The defendant thereupon moved to nonsuit upon the ground that the obligation was not binding upon the defendant personally, but he

was liable thereon, if at all, in his representative character alone, and that it was payable out of a specific fund, and a recovery thereon could not be had without proving the existence and extent of such fund. The court thereupon nonsuited the plaintiff, to which decision she excepted. The General Term having affirmed the determination of the trial court, the plaintiff took this appeal.

We think the court below erred as to both of the grounds upon which their judgment proceeded. That the defendant was liable upon the draft, if liable at all, in his individual capacity alone, seems under the authorities to admit of no doubt.

Being of the opinion, therefore, that the defendant is liable upon the draft in question in his individual capacity alone, the question still remains as to the extent of such liability. He was undoubtedly competent to enter into a personal contract in reference to the funds in his possession, and in such case would be bound to perform according to the tenor and legal effect of the obligation assumed by him, and entitled to be allowed the amount paid upon an accounting, as executor. Such instruments are subject to the rules of construction applicable to other contracts, and must be interpreted upon consideration of the language used by the parties, with a view of arriving at their intention in executing them. The court below held that the draft in question was payable only from a particular fund, and was, therefore, non-negotiable, and enforceable only to the extent of the fund referred to.

Considering the question, as we are compelled to do, from the language of the instrument alone, we are unable to agree to the interpretation thus put upon it. It is not claimed that there is any distinction between the instrument in question and an ordinary bill of exchange except that made by the clause referring to the mother's estate. Unless that clause deprives the paper of its commercial character, the rights and liabilities of the parties thereto must be governed by the rules pertaining to negotiable securities, which would render the defendant liable for the amount named in the draft, upon the theory that his acceptance was an admission by him of assets applicable to its payment.

The distinction between a fund from which a draft or order is directed to be paid, and one referred to as the means of reimbursement as to its drawee, is a material one and cannot be disregarded in the construction of such instruments. Thus it is said: "When a reference is made to a special fund merely as a direction to the drawee how to reimburse himself, and the payment is not made to depend upon the adequacy of the fund, it will not vitiate the bill."¹ Edw. on Bills and Notes, § 158. See also Parsons on Merc.

¹ N. I. L. § 20.

Law, 87; Chitty on Bills, 158; Dwight, Com., in *Munger v. Shannon*, 61 N. Y. 255.

It is thus seen that the mere mention of a fund in a draft, does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have that effect, that it contains either an express or implied direction to pay it therefrom and not otherwise.

The question, therefore, to be determined here is, whether the fund in question is referred to as the measure of liability or the means of reimbursement. While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it is mentioned only as the source of reimbursement. No express language in it can be pointed out as requiring its payment from the funds mentioned, and none from which that requirement can be implied, except such as exists in all drafts where a fund is referred to. Its language is to "charge the amount against me and of my mother's estate," and contains no provision for delay until the amount is realized from the estate, or for payment *pro tanto* in case the estate should prove insufficient to pay the whole amount. There is no language importing a transfer of the fund to the payee, and nothing from which such an intention can be inferred. The draft contains an absolute direction to pay a fixed sum, at a specified date, with interest. It imports a present indebtedness of a sum named, from the drawee to the payee, and an absolute direction to pay that sum at a fixed date, subject to no contingency either as to time or amount. In express language he directs the amount when paid to be charged against him individually, and adds the words, plainly implying, as we think, that the fund for the acceptor's reimbursement would be found in an amount eventually or immediately payable to the drawer from his mother's estate.

We think, also, that the insertion of words expressly making the paper negotiable was quite significant, and indicated an intention on the part of all parties that it should be transferable, and partake of the character of commercial paper. Any contingency inferable from the language of the draft, making the amount payable thereon indefinite and uncertain, would tend largely to depreciate its value for such purpose, and defeat the intention with which it was apparently made.

If the language of the paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him, but as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and, we think, should be held to the contract which other parties were authorized by his acceptance to infer he intended to make.

In all the cases examined by us where an order has been held to operate as an equitable assignment of a fund, there were either special phrases contained in the instrument, indicating an intent to have it so operate, or ambiguous language used, which, construed in the light of surrounding circumstances, justified the inference of a limitation of liability. *Parker v. Syracuse*, 31 N. Y. 376; *Alger v. Scott*, 54 N. Y. 14; *Munger v. Shannon*, 61 N. Y. 251; *Ehrichs v. DeMill*, 75 N. Y. 370; *Brill v. Tuttle*, 81 N. Y. 454. Here, however, there is no such language, and this contract is to pay a fixed amount at a specified date, absolutely and unconditionally.

We are, therefore, of the opinion that the instrument in question is a bill of exchange, and rendered the parties executing it liable absolutely for the amount stated therein.

The judgment of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

SMITH v. KENDALL.

Supreme Court of Michigan, July, 1861. 9 Mich. 240.

The sum payable must be certain,¹ and certainty is to be determined according to the law merchant.

ACTION by the indorsee against the makers of a promissory note in the following form:

"\$793.98.

NEW YORK, July 13, 1858.

Eight months after date, we, the subscribers, of Grand Rapids, county of Kent, state of Michigan, promise to pay to the order of Ely, Brown & McConnell, seven hundred and ninety-three 98-100 dollars, at the banking house of Duncan, Sherman & Co., value received, with current exchange on New York.

(Signed) SMITH & McCONNELL."

Indorsed by Ely, Brown, & McConnell.

Verdict was for the plaintiff, and the defendant brought writ of error.

[Argument not reported.]

MANNING, J. The instrument for \$793.98, it is argued, is not a promissory note, because it is payable with current exchange on New

¹ N. I. L. § 19.

York. It calls for \$793.98, if paid in the city of New York; if paid elsewhere, it calls for that amount, with such additional sum, called exchange, as will make the amount, where paid, equivalent to \$793.98 in the city of New York.

A promissory note must be for the payment of a certain sum of money. Exchange varies from time to time, and might have been more or less when the \$793.98 were to be paid than when the instrument was given. Is this fluctuation, to which exchange is subject, such a contingency or uncertainty as the rule requiring a note to be for a sum certain was intended to guard against? We think not. Bills of exchange and promissory notes are commercial instruments, and, to facilitate commerce, are subject to certain rules of law not applicable to other contracts. These rules should be liberally construed, and in such a way as to effect the object had in view. Exchange is an incident to bills for the transmission of money from one place to another. Its nature and effect are well understood in the commercial world; and merchants having occasion to use their funds at their place of business, sometimes made the currency at that point the standard of payments made to them by their customers at a different point. Such is the design of the instrument before us; and we believe such instruments are considered by commercial men to be promissory notes. In *Pollard v. Herries*, 3 B. & P. 335, P. deposited a sum of money with H., in Paris, and took H.'s note, "payable in Paris, or, at the choice of the bearer, at the Union Bank in Dover, or at H.'s usual residence in London, according to the course of exchange upon Paris." This instrument was declared on as a promissory note, and spoken of and treated by both counsel and court as a promissory note. It is called a promissory note by the reporter, and treated as such by Mr. Chitty in his treatise on Bills of Exchange, pp. 232, 424. In *Leggett v. Jones*, 10 Wis. 34, a written promise to pay a sum of money, "with exchange on New York," was held to be a promissory note.

There is nothing in the other objection. The note was indorsed by Ely, Brown, & McConnell, and every indorsee is the assignee of the indorser. The judgment must be affirmed, with costs.

MARTIN, C. J., concurred.

CHRISTIANCY, J. I concur in the opinion of my brother Manning. So far as relates to the question of exchange, I think this note should be considered as resting upon substantially the same principle as if made payable in New York without exchange.

CAMPBELL, J., dissenting. I do not think that a negotiable promissory note can be made except for a sum certain. This is an old and familiar doctrine, which is laid down by the best authorities without qualification. And while it is undoubtedly true that railroad bonds and some other securities of like character, made by corporations, have been held negotiable, yet there is no real difference between these

and ordinary negotiable paper except in their being under a corporation seal, which is merely the most appropriate evidence of corporate action. The requisites of certainty, both as to time and mode of payment, have always been regarded as substantial, and as the most essential elements of paper made for circulation and payable to the holder. And although a *quasi*-negotiability has been asserted of bills of lading and some documents of like character, yet complete negotiability has never been extended beyond such paper as has, since the statute of Anne, possessed that quality by commercial law. And it does not seem to me in harmony with any principle of law to break down the settled rules which have given value and currency to such securities. If negotiability only meant the liability to be sued in the name of a bearer or indorsee, it would be of little consequence. But when paper is made negotiable, it passes from one to another discharged of all equities until its maturity. The parties who make, or accept, or indorse it, become subject to peculiar liabilities. And I do not think anything short of a clear legislative authority should be permitted to affix such burdens or privileges to any new class of contracts.

In the case of *Pollard v. Herries*, 3 B. & P. 335, the action being between the immediate parties to the note, no question arose concerning its negotiable character; and there is no English case, that I am aware of, which has given any countenance to innovation on this subject. So far as any practice has existed in this State, in relation to notes payable with exchange, I believe it has not been in favor of their negotiability. The question has been raised several times in the federal court within my own experience, and every case I have known has held them not to possess that character. And I doubt exceedingly whether the general opinion of commercial men is by any means settled in their favor.

There is no reason why one kind of uncertainty should be more favored than another. It is very well settled by most courts, that a note payable in current bank-bills is not negotiable. And yet the principal objections to allowing bank-bills for this purpose apply to exchange. They both fluctuate in value under very similar conditions. The difference of exchange between two places has no direct connection with the expense of transporting money. It is as cheap to take money from New York to London as from London to New York, and yet there is a difference of about ten per cent in favor of London almost always. There are, however, no means of calculating the rate in advance; and fluctuations of several per cent occur within a few weeks. Nor can the promise contained in the note before us be regarded as equivalent to an agreement to pay what will make a uniform sum in New York. This can only be on the assumption that the balance of exchange will always be one way; whereas it is very well known that there is no such certainty. And

this note would not be satisfied by a payment of less than the sum mentioned in it, although it might be worth much more than the same amount in New York. It is very true that New York is likely to have balances against us, but the principle adopted, if true at all, must apply to all places.

It may be that public convenience would be subserved by changing the existing rules. But to hold this paper negotiable would, I think, be not an application of a common-law principle to a new subject, but the abrogation of a principle entirely. This would come more appropriately from another department of the government. I regret that I have not been able to satisfy myself with the conclusions of the court upon this question, which is certainly one of general interest. Upon the other points in the case I concur.

MATTISON v. MARKS.

Supreme Court of Michigan, April, 1875. 81 Mich. 421.

And the promise or order must be to pay at a fixed or determinable future time.¹

SUIT on a written promise to pay a sum of money "on or before" a day named.

[Argument not reported.]

COOLEY, J. . . . [A question of payment here considered, the ruling of the lower court being held erroneous.]

This view will dispose of the case, unless the defendant is correct in the position he takes, that the paper sued upon is not a promissory note. If it is not, the suit must fail, because the declaration has treated it as such, and is not adapted to the case of any other special contract. The objection to this instrument is, that it promises to pay a certain sum of money "on or before" a day named; and this, it is said, is not a promise to pay on a day certain, and consequently cannot be a promissory note. We are referred to *Hubbard v. Mosely*, 11 Gray, 170, in support of this view. That case certainly seems to support the position of defendant, and it is to be regretted, perhaps, that the learned judge who delivered the opinion did not deem it important to present more fully the reasons that led him to his conclusions, instead of contenting himself with a simple reference to the general doctrine that a promissory note must be payable at a time certain. It seems to us that this note is payable at a time certain. It is payable certainly, and at all events, on a day particularly named; and at that time, and not before, payment might be

¹ N. I. L. § 18, 3; § 21.

enforced against the maker. It is impossible to say that this paper makes the payment subject to any contingency or puts it upon any condition. The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose; but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon sound reason, and we can discover no sound reason for the distinction here insisted upon.

The judgment must be

Reversed.

NOTE. — The doctrine of *Hubbard v. Mosely* was affirmed in the cases of *Way v. Smith*, 111 Mass. 523, and in *Stults v. Silva*, 119 Mass. 137, though in all these cases the fact seems to have been ignored that it had been decided in *Cota v. Buck*, 7 Met. 589, *ante*, p. 45, that a note payable "on or before" a certain time was negotiable. In the later cases, however, there were provisions in the instruments that the principal sum was to be reduced by a deduction of interest for the time, in case payment were made before the day set; hence the difficulty was presented that the sum payable was not certain. It is said in *Way v. Smith*, "This stipulation gives the maker the right to pay the note at any time before its maturity at his option, and such payment would discharge his contract. It renders the contract uncertain and contingent, both as to the time of payment and the amount to be paid, . . ." See *contra*, *Albertson v. Laughlin*, 173 Pa. St. 525; *Beatty v. Western College*, 177 Ill. 280; *Bigelow, Bills and Notes*, 30, 36; N. I. L. § 21, 2.

ADAMS v. KING.

Supreme Court of Illinois, December, 1854. 16 Ill. 168.

To the order of a payee, named or sufficiently described in the instrument.¹

DEMURRER to a declaration overruled.

[Argument not reported.]

SCATES, J. . . . The error assigned is for overruling a demurrer to the declaration. It was in *assumpsit*, and contained two counts; each upon a promissory note made by plaintiffs in error to "the administrators of Abner Chase, deceased," for \$400, with six per cent interest from date, for value received, dated 7th March, 1853, one payable in six and the other in twelve months. The declaration further avers that defendants were the administrators of Abner

¹ N. I. L. § 18, 2.

Chase on the 7th March, 1853, with profert of the letters of administration, dated 19th December, 1851, and that the notes were executed, delivered, and made payable to the defendants by the name and style of the "administrators of Abner Chase, deceased."

The objections taken are, that this is not a promissory note; that there is no payee, or that the payee is uncertain; or if there be a payee, it is a promise to defendants in their representative character, and they should sue as administrators.

We do not assent to either objection. The general rule in relation to bills of exchange and promissory notes requires that the person to whom they are made payable shall be specified. Chit. on Bills, 156. But this may be done without inserting the name; for that is certain which may be rendered certain; and if the payee be so certainly described or referred to as to be easily ascertained by allegations and proofs, the promise will be valid.¹ The declaration avers that plaintiffs were "administrators of Abner Chase, deceased," at the time these promises were made, and that they were made to them personally by that designation and description. These are traversable allegations, and must be denied under oath, by our statute, as settled in *Frye v. Menkins*, 15 Ill. 339. The same rule was applied in ascertaining the promisors in *Dwight v. Newell*, 15 Ill. 333. They have not sued as administrators, and it was therefore unnecessary to aver that they were administrators at the time this action was commenced. The demurrer admits the promise to be to defendants personally, by a descriptive phraseology.

The case referred to in *Breese*, 2, was ruled upon the ground that there was no payee, and that in *Breese*, 155, was upon the same ground. The case of *Berry v. Hawly*, 1 Scam. 468, was put upon the ground of a want of power in a county treasurer to take under such a promise.

The cases in 15 Ill. are decisive of this, in principle. The judgment must therefore be

*Affirmed.*²

ARMSTRONG v. NATIONAL BANK.

Supreme Court of Ohio, January, 1889. 46 Ohio State, 512.

Or to bearer, in terms or by implication of law; e. g. to the order of a fictitious or non-existing person, such fact being known to the promisor.³

ACTION to recover the balance of a deposit made by the plaintiff in the defendant bank.

¹ N. I. L. § 25.

² Cf. *Shaw v. Smith*, 150 Mass. 136, in which a note payable to "F. B. B.'s estate or order" was held to be negotiable.

³ N. I. L. § 26.

The plaintiff purchased of one Grimes, a promissory note, purporting to be signed by one William Brown, and gave in payment therefor, a cheque on the defendant bank, payable to "William Brown or order." There was no such person as William Brown. Grimes indorsed the cheque, "William Brown," added his own indorsement, and presented it to the bank, which paid the amount thereof to Grimes.

The plaintiff had judgment in the Court of Common Pleas, which judgment was reversed by the Circuit Court, and the plaintiff brought writ of error.

[Argument reported.]

MINSHALL, C. J. . . . By the fraud of one Grimes the plaintiff was induced to purchase a note that had no real existence as a security. She is found by the court to have been ordinarily careful and prudent in the transaction, but was deceived. She supposed that she was purchasing a valid security belonging to a man, as represented by Grimes, by the name of William Brown, and for whom, as he represented, he was acting as agent, and gave to the assumed agent for Brown a cheque for the amount, payable to Brown or his order. Now it is evident, both upon reason and the authority of the previous decisions, that the circumstances under which the plaintiff was induced to give the cheque, even though calculated to arouse suspicion on her part, cannot modify the duty required of the bank in the matter of paying or not paying the cheque. It is not claimed that the bank had any knowledge of how or under what circumstances Grimes had obtained the cheque, and there is no finding of any such course of dealing between the bank and the plaintiff as would have authorized it to depart from the general duty of a bank in paying the cheques of its customers, drawn payable to a certain person or order. It was its duty to pay to the person named or his order, and to withhold payment until it was satisfied, both as to the identity of the payee and the genuineness of his signature. *Morse on Banking*, § 474; *Robarts v. Tucker*, 16 Q. B. 560, per Maule, J., at p. 578.

It is found that the bank made the usual inquiries respecting the identity of Grimes, and in other respects was ordinarily careful and prudent in relation to the transaction; but this must be taken in connection with the further fact that Grimes was not the payee of the cheque, and that his indorsement, without the genuine indorsement of the payee, could confer no title upon the holder of the cheque, or any interest in it, as against the drawer. . . . The indorsement on the cheque, purporting to be that of the payee, Brown, had been placed there by Grimes, and was either a forgery or a fraud, and, for the purposes of this case, it is not material which it

is termed. As to it the bank acted upon the representations of Grimes, and did not otherwise know whether it was genuine or not. As said in *Dodge v. The Bank*, 30 Ohio St. 1: "The rightful possession of a cheque by no means carries with it or implies a right to demand or receive payment of it, without the genuine indorsement of the person to whose order it is made payable;" and if a banker accept or undertake to pay a cheque, "he must see to it, at his peril, that he pays according to the terms of the order, and to the party named therein, or to one holding it under the genuine indorsement of such payee. . . . And this is true, whether the defendant exercised the degree of caution which bankers usually do in such cases, or not. The question is, was the cheque paid to the party to whom, by its terms, it was made payable?" Therefore, the court rightly concluded, as a question of law from the facts found, that the payment of the cheque by the defendant was not authorized by the plaintiff, and that it could not rightly be charged to her account.

The fact that the cheque was made payable to a person that had no existence does not alter the rights of the plaintiff as against the bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a cheque or bill made payable to a fictitious person, as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. . . . *Minet v. Gibson*, 3 T. R. 481; s. c. in the House of Lords on error, *Gibson v. Minet*, 1 H. Bl. 569. . . . The doctrine that a bill payable to a fictitious person or order, is equivalent to one payable to bearer, had its origin in these cases, which all grew out of bills drawn by *Levisay & Co.*, bankrupts, payable to a fictitious person or order, and were accepted by *Gibson & Co.*; but it will be noticed that the holding in each case was upon the express ground, that the acceptor knew at the time of his acceptance that the bill was payable to a fictitious person, and but for this fact the fictitious indorsement would have been held to be a forgery — some of the judges expressing a doubt whether it was not so, although its character was known to the acceptor. 3 T. R. 481. These cases will be found reviewed in a note to *Bennett v. Farrell*, 1 Campb. 130. It was held in this case that a bill made payable to a fictitious person or order, is neither payable to the order of the drawer or bearer, but is completely void. But in an *addendum* to the case, at page 180c of the report, Lord Ellenborough observes that this holding must be taken with this qualification: "unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." . . . Mr. Daniel, in his work on Negotiable Instruments, § 139, states the rule to be general, but, as shown by Mr. Randolph, the cases do not bear out the text. 1 Rand. Com. Paper, § 164, note (4). And upon principle we do not see how the law could be held to be other-

wise. For if the fictitious character of the payee is unknown to the drawer, whoever indorses the paper in that name with intent to defraud, perpetrates a forgery, and the indorsement is void, a general intent to defraud being sufficient to constitute the offence.

The case of *Lane v. Krekle*, 22 Iowa, 399, is not in point, for there the note was made payable to a fictitious person "or bearer," and passed by delivery without indorsement. The case of *Phillips v. Im Thurn*, 114 Eng. C. L. 694, cited by the learned judge, is clearly distinguishable from the case before us. There the signature of the drawer, as well as the indorsement, was a forgery; but the defendant, the acceptor, was held liable because the plaintiff discounted the paper, relying in good faith upon the acceptance of the defendant. The case was finally disposed of on a case stated, reported in 1 Law Rep. C. P. 463. The ground of the decision appears from the following observations of Keating, J., p. 472: "I think, upon the facts stated in this special case, that it was not competent to the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching by his acceptance of it the authenticity of the drawing. His acceptance amounted to a representation to the plaintiffs, which enabled the person representing Plana to obtain money from the plaintiffs on the bill." The decision in this case simply followed a well recognized principle in the law of notes and bills. It is thus stated by Mr. Smith: "Though the drawer's signature be forged, the drawee, if he accepts the bill, is bound to pay it, provided it be in the hands of a holder *bona fide* and for value, for the drawee's acceptance admits the drawer's handwriting to be genuine." Smith's Mercantile Law, 334. Now, Mrs. Armstrong can in no way be said to have affirmed by any act of hers that the indorsement upon the cheque was genuine, for there was no indorsement on it when it left her hands. . . .

If the drawer of a cheque, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the cheque to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other; that is, determine whether the indorsement is a genuine one or not. That fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement. The fact is that an ordinarily prudent banker would be less liable to be deceived into a mistaken payment by a fictitious indorsement such as this was, than by a simple forgery. The determination of the character of any indorsement involves the ascertainment of two things: (1) the identity of the indorser, and (2) the genuineness of his signature;

and no careful banker would pay upon the faith of the genuineness of any name until he had fully satisfied himself both as to the identity of the person and the genuineness of his signature. Now, a careful banker may be deceived as to the signature of a person with whose identity he may be familiar; but he is less liable to be deceived where both the signature and the person whose signature it purports to be are unknown to him. In making the inquiry required in such case to warrant him in acting, he will either learn that there is no such person, or that no credible information can be obtained as to his existence, which, with an ordinarily prudent banker, would be the same as actual knowledge that there is no such person, and he would withhold payment, as he would have the right to do in such case. But still, if he should be deceived as to the existence of the person, he would, nevertheless, require to be satisfied as to the genuineness of the signature. Of this, however, he could not be through his skill in such matters, and on which bankers ordinarily rely, for he would be without any standard of comparison, and he could have no knowledge of the handwriting of the supposed person, for there is no such person. So that, if he acts at all, it must be upon the confidence he may place in the knowledge of some other person; and if he choose to act upon this, and make, instead of withholding, payment, he acts at his peril and must sustain whatever loss may ensue. . . .

The case of *Vagliano Brothers v. The Bank of England*, recently decided in England by the Court of Appeal, 23 Q. B. D. 243, and called to my attention since the above opinion was written, fully supports the conclusion we have reached.¹

Judgment of the Circuit Court reversed, and that of the Common Pleas *Affirmed.*

¹ This case afterwards went to the House of Lords, where the decision of the Court of Appeals was reversed. See L. R. 1891, A. C. 107. The case was decided, however, upon the Bills of Exchange Act, § 7 (3), which provides that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." Cf. N. I. L. § 26, 3; and see Bigelow, *Bills and Notes*, 26.

CHAPTER IV.

MAKER'S CONTRACT.

[There is no doctrine of undisclosed principals in the law merchant touching negotiable instruments.¹]

SLAWSON *v.* LORING.

Supreme Court of Massachusetts, November, 1862. 5 Allen, 840.

A person acting as a representative may bind his constituent, if, having authority, he discloses the constituent and uses apt words to make the promise that of the constituent; ² descriptive words will not have this effect.³

CONTRACT against the acceptor of two drafts, the first of which was in form and appearance as follows, the written portion being here printed in italics:

"No. 40. Office of Portage Lake Manufacturing Company,
Hancock, Mich., *June 5th, 1861.*

E. T. LORING, Agent,
39 State St., Boston,

At Four Months sight, pay to the order of F. H. Slawson Four Hundred DOLLARS, and charge the same to account of this company.

\$400.

I. R. Jackson, Agt."

(Written across the face of the draft,) "Accepted June 15, E. T. Loring, Agent." (Indorsed,) "Pay to the order of Mary M. Slaw-

NOTE. — The term "representative" is used here to include all those who act for another, and the correlative term, "constituent," to include all those for whom another acts. Representatives are then considered as of two classes: first, those who may possibly have authority to act for another, e. g. agents in the strict sense; and second, those who may not bind their constituents, e. g. cases in which there is no possible authority to bind the constituent on negotiable instruments, such as trustees, guardians, and executors or administrators.

¹ N. I. L. § 35.

² Id. § 37.

³ Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101, in which the signature "D. F. & Co., Agts. Piscataqua F. & M. Ins. Co.," was held to bind D. F. & Co. personally.

son, I. H. Slawson. Pay to Dupee, Beck & Sayles or order, Mary M. Slawson. Without recourse to Dupee, Beck & Sayles."

The second draft was for \$1034, dated the same day, and precisely similar in other respects to the first.

It was agreed in the Superior Court that the drafts were duly presented to and accepted by the defendant, as appears upon them, and that payment was refused at their maturity. It was also agreed, subject to the right of either party to object to the competency of the facts, that I. R. Jackson and others composed a firm doing business at Hancock, Michigan, under the name of the "Portage Lake Manufacturing Company," of which the defendant was not a member. Jackson was agent of this firm at Hancock, and the defendant was agent of the same firm at Boston, and these facts were known to the payee at the time the drafts were drawn. Mary M. Slawson, the second indorser, was the wife of I. H. Slawson, the payee, and at the time of her indorsements lived with her husband in Michigan, and there placed her name upon the drafts by his direction, she having no interest in them, and he delivered them to the plaintiff for a valuable consideration, the direction to pay to Dupee, Beck, & Sayles being for the convenience of the plaintiff. The drafts were presented to the defendant for acceptance at the request of the plaintiff, after the indorsements thereon by Mary M. Slawson, the plaintiff knowing that she was the wife of I. H. Slawson, and that the defendant was the agent at Boston of the said company.

Upon these facts, judgment was rendered in the Superior Court for the defendant, and the plaintiff appealed to this court.

[Argument not reported.]

BIGELOW, C. J. The plaintiff shows a good title to the drafts. It is true that the payee, by his indorsement and delivery of them to his wife, vested the property in her; but they were *choses in action* the possession and control of which he might at any time during coverture resume. This he did by procuring her indorsement thereon, taking them into his own hands again, and passing them over to the plaintiff. Her indorsement, having been made by his authority and assent, was sufficient to vest the title in her indorsee. *Stevens v. Beala*, 10 Cush. 291; *Allen v. Wilkins*, 3 Allen, 321.

The only other question arising on the agreed statement of facts is, whether the defendant is liable as acceptor of the drafts. This depends exclusively on the fair result of the inspection of the drafts themselves, that is, whether on the instruments as they appear, it can be reasonably inferred that the acceptor disclosed his principal, and that the intent was to bind the principal and not himself. Being negotiable paper, all evidence *dehors* the drafts is to be excluded. It

is wholly immaterial, therefore, that the defendant was in fact the agent of the company named on the face on [of] the drafts, that the plaintiff knew that he was so, and that the defendant had no personal interest in the company. *Fuller v. Hooper*, 3 Gray, 334, 341; *Bank of British North America v. Hooper*, 5 Gray, 567; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338. The rule excluding all parol evidence to charge any person as principal, not disclosed on the face of a note or draft, rests on the principle that each person who takes negotiable paper makes a contract with the parties on the face of the instrument, and with no other person.

Taking the signature of the defendant as acceptor, written across the face of the drafts, by itself, without reference to other parts of the instruments, it is clear that it would bind him personally. It discloses no principal, nor is it in a form which would exclude the personal liability of the acceptor. It is equivalent to this promise: "Having funds of the drawers in my hands, I hereby agree to pay the amount of the drafts at maturity." The addition of the word agent to his name is not sufficient to exempt a party from liability on such a contract. It is a mere *descriptio personæ*, designed to indicate the fund to which the money is to be charged, or the use to which it is to be appropriated. This is clear on the authorities. *Forster v. Fuller*, 6 Mass. 58; *Thacher v. Dinsmore*, 5 Mass. 299; *DeWitt v. Walton*, 5 Selden, 571; *Seaver v. Coburn*, 10 Cush. 324; *Fiske v. Eldridge*, 12 Gray, 474; *Haverhill Ins. Co. v. Newhall*, 1 Allen, 130; *Mare v. Charles*, 5 El. & Bl. 978.

We are, then, to look at other parts of the instruments to see whether there is anything to indicate that the acceptor signed as agent for a principal who by reasonable intendment can be held to have been disclosed to the purchaser of the drafts. The first and most obvious conclusion which is to be drawn from the form of the bills is, that the drawer signs his name as agent of the company named therein, and that they are intended as drafts, not of the agent personally on his own funds in the hands of the drawee, but as those of the principals acting through their agent on funds belonging to the company. This appears clearly from the fact that the bills bear date at the office of the company in Hancock, Michigan, and direct the drawee to charge the amount of them "to the account of this company," the drawer signing his name after these words. No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon. So far as the liability of the drawer is concerned, the case is not unlike that of *Fuller v. Hooper*, already cited. This construction of the instruments declared on is not without its bearing on the liability of the drawee. It gives full effect to the forms of the bills, to the fact that they are drawn on blank printed forms manifestly prepared for the use of the company, and that they are

dated at the office of the company in the place where their business is chiefly carried on. These circumstances have reference to the capacity in which the bills were signed by the drawer. It is his language which they speak, and they show his intent to disclose the principals for whom he acted as agent in making the drafts. So much, then, of the language of the instruments is appropriated and exhausted in qualifying the liability of the drawer. It is difficult to see how they can be again applied in giving an interpretation to the instrument which shall also absolve the drawee to whom they were addressed, on his separate and distinct contract as acceptor. They can have no meaning beyond that which they plainly import, namely, an order by the company through their agent to pay to the holder a certain amount of money. What, then, is left on the face of the drafts to show that the defendant is not liable as acceptor. Nothing, except the single circumstance that the address to him as drawee is printed in large capital letters at the top of the bills, between the date and the body of the instrument, with the addition thereto of the word "agent." This, certainly, does not necessarily or even *prima facie* indicate that he is the agent of the drawers. It is, to say the least, equally consistent with the idea that he is the agent of some third person not named on the face of the bill. Nor can we give any great effect to the fact that the defendant's name as drawee is printed as part of the blank used by the company. A draft or bill in like form might be used, if their course of business was to deal with him as the agent of some other person or company. We are unable to see, therefore, that there is anything on the face of the bills, which, fairly interpreted, discloses any principal for whom the defendant acted in accepting the bill, whereby he can be absolved from personal liability thereon.

But there is another and broader view of the contract into which the parties entered, which is strongly indicative of an intent by the defendant to be bound by his acceptance. The instruments declared on purport to be bills of exchange, having a drawer and acceptor. By putting their contract in such form, the intention of the parties must have been to issue paper which should be received by those who took it in the usual course of business, according to the legal and ordinary effect which such form imports, as giving to the holder the security of the names of the parties. Otherwise, if they intended to bind one party only, it is reasonable to suppose that bills would have been drawn by the company on itself, in which case the direction and request to pay would have been on the company by its name, and not upon an individual described only as an agent. The argument urged in support of the defence would pervert the bills into a contract different from that which they import on their face. If they should be construed to be drafts by the company on itself, they would be in legal effect merely promissory notes on which the holder

would have only the security of one name, which would be contrary to the intent and purport of the instruments. The early case of *Thomas v. Bishop*, 2 Stra. 955, and Rep. Temp. Hardw. 1, cited with approval by this court in *Taber v. Cannon*, 8 Met. 456, 460, is strikingly like the case at bar. It was the case of a draft drawn by a company addressed to their cashier, who was a servant in the employment of the company. It was accepted by him, and he was held personally liable on the draft.

Judgment for the plaintiff.

BALLOU v. TALBOT.

Supreme Court of Massachusetts, October, 1820. 16 Mass. 461.

If the act is unauthorized, the representative's liability, if any, is at common law; no one is liable on the instrument.

THE declaration was "in a plea of the case, for that the said Talbot, at etc. on etc. by his note of that date, by him subscribed, for value received, promised the plaintiff to pay him or his order 380 dollars on demand with interest," etc.

Trial on the general issue in May last before JACKSON, J., at Taunton. The note produced was signed by the defendant; and after his name were added the words, "agent for David Perry." The defendant objected that this evidence did not comport with the declaration. The plaintiff offered to prove that the defendant was not authorized to make the note as agent for Perry. The defendant contended that, if that was the fact, still the plaintiff could not recover in this action; and that he should have brought a special action on the case, setting forth that the defendant undertook to act as agent, and pretended to have such authority, when he was not authorized.

The judge overruled this objection, intending to reserve the question for the consideration of the whole court. The trial proceeded, and the plaintiff obtained a verdict on the ground that the defendant was not authorized to sign the note as agent to Perry.

If, in the opinion of the court, the plaintiff was entitled to recover under these circumstances, judgment was to be rendered on the verdict; otherwise, the plaintiff was to become nonsuit; or such order made in the cause as to the court should seem proper.

[Argument reported.]

PARKER, C. J. The question in this case is not, whether the defendant is liable for having undertaken to make the promise for Perry, but whether the note declared on is the note of the defendant.

It is obvious from the signature, that it was neither given nor received as the defendant's note. It is found by the jury that he had no authority to sign it for Perry; but the legal inference from this fact is, not that it became his promise directly, but that he is answerable in damages for acting without authority. What is stated in the case of *Long v. Colburn*, 11 Mass. 97, as an intimation of the court, was undoubtedly a settled opinion, viz. that in such case, a special action upon the case would be the proper action.

One way, and perhaps the best way, to ascertain whether a party is sued in the right form of action, is to see of what fact the declaration gives him notice, and whether that constitutes substantially the contract to which he is called to answer. In the case before us the defendant is charged with having made a promissory note to the plaintiff. The evidence produced is apparently the note of another. But he wrongfully made this note for the other. This is entirely new ground, of which the declaration gave him no notice, and which he cannot be expected to be prepared to answer.

Besides, if the note is to be considered as evidence of the defendant's own promise, he must pay according to the tenor of it; whereas, if he were sued for falsely assuming an authority, he might defend himself by showing that the person for whom he assumed to act, had afterwards ratified his act; or that he had otherwise satisfied the debt for which the note was given; or perhaps he might show that no debt was due, for which the note was given; or that he had authority to make it. It is, in short, a proper subject for a special action, in which damages will be recovered according to the injury sustained.

In the cases cited by the plaintiff's counsel, the parties held personally liable either made themselves so by the terms of the contract, though purporting to act for another; or they acted in certain capacities, in which they had no right to bind the estate of those for whom they undertook to act. In the case before us the promise was avowedly made by the defendant for Perry; and it was matter of evidence, extrinsic to the contract, whether he had authority or not. The verdict is set aside, and the plaintiff must be called.

Plaintiff nonsuit.

NOTE. — If the agent has disclosed the principal's name on the instrument, to make the principal liable under any circumstances, the agent must have used apt words; if he has merely described himself, he alone will be liable. *Bigelow, Bills and Notes*, 44.

If apt words have been used, then the question of authority becomes material. All courts agree that if the agent had authority, then the principal alone is liable; but in cases in which the pretended agent had no authority, there is a conflict, some courts following the rule of *Ballou v. Talbot*, that no one is liable on the instrument since the promise cannot be that of the alleged principal, for want of authority, nor that of the professed agent, because in terms it purports to be that of another. *Bartlett v. Tucker*, 104 Mass. 339; *West*

London Bank v. Kitson, 12 Q. B. D. 157; Taylor v. Shelton, 30 Conn. 122; Simpson v. Garland, 76 Me. 203; Duncan v. Wells, 32 Ill. 542.

Other courts hold the agent liable on the instrument by disregarding the reference to the alleged principal. In *Dusenbury v. Ellis*, 3 Johnson's Cases, 70, it was said, "If a person, under pretence of authority from another, executes a note in his name, he is bound, and the name of the person for whom he assumed to act will be rejected as surplusage"; so in *Pettingill v. McGregor*, 12 N. H. 171, 191, "If a contract entered into by one assuming to act as agent of another, but who had not the requisite authority, when stripped of what the agent had no right to put there, still contains apt words to charge the agent with a personal obligation, he is bound to the performance of the contract." See also *Weare v. Gove*, 44 N. H. 191. The Statute is not clear; N. I. L. § 37 provides that "where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument, if he was duly authorized."

The possible implication is that if the person so signing was not authorized he would be liable on the instrument. It is very doubtful, however, if the courts which had laid down the rule as in *Ballou v. Talbot*, *supra*, will change that rule, following a mere implication of the Statute.

Where the language of the instrument, stripped of that which the pretended agent had no authority to put therein, does not contain apt words to bind the agent, or where the name of the alleged principal alone appears, the pretended agent cannot be held liable on the instrument. *Wood v. Wilson*, 26 N. H. 332. "Here were no apt words to bind the defendant. It is, in express terms, the undertaking of 'the Second Methodist E. Society in Manchester, N. H.' . . . The language used is 'the Second Methodist E. Society promise to pay.'" See also *Clark v. Forster*, 8 Vt. 98; language in *Pettingill v. McGregor*, quoted *supra*; *Wilson v. Barthrop*, 2 M. & W. 863; *Polhill v. Walter*, 3 B. & A. 114. In such cases, the liability of the pretended agent in all jurisdictions is at common law, in deceit or in warranty. *Woodes v. Dennett*, 9 N. H. 55; *White v. Madison*, 26 N. Y. 117, doubting *Dusenbury v. Ellis*, *supra*, and similar cases; *Miller v. Reynolds*, 92 Hun, 400; *Clark v. Forster*, *supra*; *Bigelow, Bills and Notes*, 46.

SHOE & LEATHER NATIONAL BANK v. DIX.

Supreme Court of Massachusetts, September, 1877. 123 Mass. 148.

And though the constituent is not disclosed, the representative may disclaim personal liability.

CONTRACT. The defendants made the following promissory note, which was indorsed by the payees to the plaintiff:

"February 16, 1871, \$53,000. For value received, we as trustees but not individually promise to pay to the Boston Water Power Company or order the sum of fifty-three thousand dollars in five years from this date, with interest to be paid semi-annually, at the

rate of seven per centum per annum, during said term, and for such further time as said principal sum or any part thereof shall remain unpaid.

Signed in presence of	GEORGE P. SANGER,	} Trustees."
P. H. SEARS.	JOSEPH DIX,	
	R. A. BALLOU,	

"Secured by mortgage of real estate in Boston," by the defendants.
The question, raised on agreed facts which need not be stated here, was whether this promissory note bound the makers personally.

[Argument not reported.]

AMES, J. The question whether the defendants have made themselves personally responsible must be determined by the terms of the note itself. In determining the proper interpretation of any written contract the court will give full effect to all the terms in which it is expressed. Those terms will not be modified by extrinsic evidence tending to show that the real intention of the parties was something different from what the language imports. They will be taken in their plain, ordinary, and popular sense, except where it may be qualified by some special usage, or where the context evidently shows that the parties in some particular case had a different intent. It is no part of the business of the court to make or alter a contract for the parties. Even if it be found that the contract, according to its true meaning, has no legal validity, or fails to become operative, it is not for the court, in order to give it operation, to suppose a meaning which the parties have not expressed, and which it is certain they did not entertain. It must be assumed that all the language used in the contract was selected with some purpose and is to be of some effect. If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law. Sedgwick, J., in *Sumner v. Williams*, 8 Mass. 162, 184. In a question as to the meaning of a contract the want of apt words to create a personal liability is not to be supplied by the alteration or enlargement of its terms.

In applying these familiar and elementary rules of construction to the case now before us we find that the defendants promised "as trustees but not individually." The construction contended for by the plaintiffs would require us to strike out the words "but not individually;" although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.

It is to be borne in mind that this was not a case of agents acting

for an undisclosed or unknown principal, and is therefore readily distinguishable from *Winsor v. Griggs*, 5 Cush. 210, and cases of that class. Neither was it an attempt by the defendants to bind property over which they had no legal control. By the terms of the deed they had power to mortgage, lease, and manage the property at their discretion, but for the benefit and on the account of the equitable owners, namely, the members of the Brookline Avenue Association. In this respect the case differs from *Thacher v. Dinsmore*, 5 Mass. 299, *Forster v. Fuller*, 6 Mass. 58, and other cases of that class, in which a party promising "as guardian," etc., was held to have made himself personally liable.

Neither can it be said that the term "trustees" was used as "a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency." In this respect the case differs from *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 101. It often has happened that an agent for another person, or the treasurer of a corporation, has made himself personally responsible by the form of words in which he has expressed himself in a written contract, when he may have intended to bind his principal only. Cases in which this question has been raised have often been before this and other courts, and the authorities have recently been collected and reviewed in several of our own decisions. See *Slawson v. Loring*, 5 Allen, 340; *Barlow v. Lee Congregational Society*, 8 Allen, 460; *Tucker Manuf. Co. v. Fairbanks*, *ubi supra*. But we believe no case can be found in which a promise "as trustee," etc., accompanied with an express disclaimer of personal liability, would fail to exempt him.

It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves we need not decide whether they have or have not bound their principals. *Abbey v. Chase*, 6 Cush. 54. But even if the written contract should fail of taking effect as a negotiable note, it might still be operative as an acknowledgment of unpaid debt, which the mortgage was intended to secure. It may be that this was all that the original parties intended or supposed to be material. They may have considered the mortgage sufficient security, without the personal responsibility of the trustees.

Our conclusion, therefore, is that without proof that the defendants, as trustees, have funds of the association in their hands applicable to this debt, no actions can be maintained against them. No evidence to that effect having been offered, we must order

Judgment for the defendants.

GRAFTON NATIONAL BANK v. WING.

GRAFTON SAVINGS BANK v. SAME.

Supreme Court of Massachusetts, February, 1899. 172 Mass. 513; 52 N. E. Rep. 1067.

Where there is no possible authority, the constituent cannot be bound; *quære*, whether the representative will be liable at common law, where the promise purports to be in terms that of the constituent.

Two actions of contract upon promissory notes. The first of the notes in the first case was as follows:

"\$2000.00. Grafton, February 1st, 1892. Four months after date we promise to pay to the order of ourselves two thousand dollars at Grafton National Bank. Value received. Wheeler Cotton Mills, Henry F. Wing, Treas'r."

Indorsements:

"Waiving demand and notice. Wheeler Cotton Mills, Henry F. Wing, Treas. Estate of Jona. D. Wheeler, Henry F. Wing, Executor."

The second note was for \$3000, and was otherwise identical with the first note, except that it was dated February 17, 1892.

The Grafton Savings Bank was the payee in the note in the second case. This note was otherwise like the note *supra*.

The cases were tried together without a jury, before HOPKINS, J., who allowed a bill of exceptions in substance as follows:

Henry F. Wing was the defendant's intestate, and was the treasurer of the Wheeler Cotton Mills, and also executor of Jonathan D. Wheeler's will. The plaintiff in each case had received a part payment under a compromise agreement with the Wheeler Cotton Mills, and the plaintiffs sought to hold Henry F. Wing's estate on the ground that he was personally liable.

George K. Nichols, the president of both the plaintiff banks, testified for the plaintiff that prior to the giving of the notes, which were given in renewal of former notes similarly indorsed, and which had been originally indorsed by Jonathan D. Wheeler, and during the life of the notes in suit, he had told the defendant's intestate that the indorsements bound him personally, and not the estate of Jonathan D. Wheeler; that when Wing first gave them, notes indorsed by the Wheeler estate and by himself as executor, they questioned his right to indorse those notes in that way, and from that time constantly took that position toward him; that Wing said he thought he had the right; that they took the notes with Wing's indorsements, feeling that he was good for them, and that he would be holden for them; that he was told so, and the banks consulted counsel and were told that that was true, and they told Wing what the counsel said; he also testified that the indorsements were on the notes at their inception.

The defendant requested the judge to rule that the actions could not be maintained. The judge refused so to rule, and found for the plaintiff in each case; and the defendant alleged exceptions.

[Argument not reported.]

HOLMES, J. These are two actions of contract against the administrator of the estate of Henry F. Wing, seeking to hold him upon two indorsements made by Henry F. Wing, as executor of the will of Jonathan D. Wheeler. The indorsements were in the following form: "Estate of Jona. D. Wheeler, Henry F. Wing, Executor."

A majority of the court are of opinion that these words mean "Estate of Wheeler by Wing," and therefore that, at least, they failed to bind Wing by contract. It is quite true that the law does not know the estate of a dead man as a contractor, and that, unless the fact that these indorsements were the renewal of indorsements by Wheeler in his lifetime makes a difference, they did not bind the estate. But that merely shows that the indorsements were made by Wing under a mistake of law, as the testimony also proves to have been a fact. But the presence of Wing's name upon the paper and his failure to bind his supposed principal are not enough to make the contract his own. *Jefts v. York*, 4 Cush. 371, and 10 Cush. 392, 395, 396; *Abbey v. Chase*, 6 Cush. 54, 56, 57; *Taylor v. Shelton*, 30 Conn. 122. If a man does not purport to be a party to negotiable paper, he is not a party to it. See further 1 Dan. Neg. Instr. (4th ed.) §§ 306, 307, 308; *Bartlett v. Tucker*, 104 Mass. 336. It is true that it is suggested by Mr. Daniel that, in such cases, an ambiguous expression may be interpreted to bind the agent, but neither that suggestion nor a presumption that the agent knew the law, can pervert words from their meaning if the meaning is plain. The so-called presumption is a requirement, not a presumption of fact, and has no bearing or weight upon the construction of instruments.

We are of opinion that the court should have ruled that the defendant was not liable.

Exceptions sustained.

NOTE. — In cases in which the representative cannot bind his constituent, e. g. guardians, executors, and trustees, the language used in reference to the constituent is construed as *descriptio personæ*, inserted only to entitle the representative to indemnity as against his constituent; that is, in cases where the form of the promise does not in terms purport to be that of the constituent. Cf. *Thatcher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58.

[By the law merchant, the payee of a negotiable instrument must be the first indorser.¹]

SYLVESTER v. DOWNER.

Supreme Court of Vermont, March, 1848. 20 Vt. 355.

In some jurisdictions, if a third person indorses in blank a negotiable promissory note, before delivery to the payee, he is *prima facie* a co-maker; his undertaking is irregular and may be explained.

ASSUMPSIT. The plaintiff declared against the defendant as maker of a promissory note payable to Austin & Fay, or order, and by them indorsed to the plaintiff's testator. There was a count also for money had and received. Plea, the general issue.

The plaintiff offered in evidence a promissory note for \$75, payable to Austin & Fay, or order, with the following indorsements: "For value received pay the contents to Lemuel Sylvester. Austin & Fay." "For value received I promise to pay this note according to its tenor to Lemuel Sylvester. Solomon Downer." To this evidence the defendant objected, for variance; but the objection was overruled. The indorsements were made in blank, and were filled up by the plaintiff before trial.

The plaintiff produced evidence that Austin & Fay were indebted to Lemuel Sylvester, and that the defendant had agreed to pay the debt, and was then the owner of the note in suit; that the defendant then proposed to Lemuel Sylvester that he would let him have the note in part payment of that debt, and that he, the defendant, "would make it good to him by putting his name upon the back of it, and Austin & Fay should do the same;" that each of the partners of said firm was then sitting at the same table with the defendant and Lemuel Sylvester, and that Lemuel then agreed to receive the note, as the defendant offered, and that the defendant wrote his name upon the back of the note and then delivered it to Austin, and that he wrote upon it the name of the firm, and that the note was then delivered to and received by Lemuel Sylvester in part payment of said debt. There was no other evidence in the case.

The court charged the jury that if they found the facts as testified, and considered from the evidence that the defendant intended, by what he said at the time of transferring the note to Lemuel Sylvester, to assume an absolute and unconditional undertaking to pay the note or see it paid, according to its tenor, they should return a verdict for the plaintiff. Verdict for plaintiff. Exceptions by defendant.

[Argument reported.]

¹ Jenkins v. Coomber, 1898, 2 Q. B. 168.

REDFIELD, J. This is an action in common form against the defendant as a sole maker of a promissory note. The note, on being produced, showed his name indorsed upon it, and also that of the payees of the note. This, according to the decisions of this court, repeatedly made, imposed upon the defendant the obligation of the maker of the note, with this difference only, that, his undertaking being in blank, as between the parties to it, it was susceptible of being controlled by oral evidence of the real obligation intended to be assumed at the time of signing. This has been so often declared by this court that it seems needless to refer to the decisions. But I will advert to some of them with a view to extract from them the principle of the decisions.

The first case which distinctly assumed this ground is that of *Knapp v. Parker*, 6 Vt. 642. In that case the note had been due before it was indorsed by the defendant, and he was sued as maker and the suit sustained. It is true the court, in their opinion, advert to a prior contract resting in parol merely; but this was clearly merged in the writing. It was of no importance in determining the *prima facie* legal obligation resulting from the signature. The law determines that; and the oral evidence was important only as tending to show that the defendant intended to assume just such an obligation as he did by the blank signature. . . . [Reviewing *Flint v. Day*, 9 Vt. 345; *Sanford v. Norton*, 14 Vt. 228; and *Strong v. Riker*, 16 Vt. 554.]

But what this court has repeatedly held upon this subject is, that he who writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the instrument; and that, although he do this long after the making of the note, it shall make no difference. If he consent to be thus bound, and induce others to take the note under that expectation, he shall be estopped to deny that fact, and is treated to all intents the same precisely as if he had signed the note in its inception. But the signature being blank, he may undoubtedly show that he was not understood to assume any such obligation.

But the proof in the present case tended to show, and the jury have so found, that the defendant did intend to assume an unconditional obligation to pay the note, according to its tenor. This puts at rest all pretence that the defendant was not understood to assume the common obligation which his signature imported. This was that of the maker of a note to *Austin & Fay*, as that was the form of the note at the time he indorsed it; and had they refused to indorse it, the defendant might have been sued as maker, in their names, according to the case of *Strong v. Riker*, 16 Vt. 554. But they did indorse it. He was then liable as maker to any person who might become a holder of the note, and especially to the plaintiff's testator, for he assumed the obligation with the understanding that the

note was going immediately into his hands, and that the defendant was liable to him. This point is fully decided by *Sanford v. Norton*, 14 Vt. 228. The declaration in this case then was precisely according to the proof, — that the defendant made a note to Austin & Fay, which was indorsed to the plaintiff's testator. . . . [Competency of a witness.]

The fact that the defendant's indorsement was filled up differently from the declaration, and differently from the import of his undertaking, is of no importance, as that is mere form, and may be made at any time, and if made wrong may be corrected at any time. It is just as well if it be not made at all.

Judgment affirmed.

UNION BANK OF WEYMOUTH AND BRAINTREE v.
WILLIS.

Supreme Court of Massachusetts, October, 1844. 8 Met. 504.

In others, he is deemed conclusively a co-maker.¹

ASSUMPSIT by the indorsees against the indorser of a promissory note of the following tenor: "August 8, 1843. For value received, I promise Tilley Willis to pay him, or order, \$350, in four months from date. T. D. Thompson." On the back was the name of B. L. Mirick & Co., and under that name was the name of the defendant, both indorsements being in blank.

At the trial before the Chief Justice, the plaintiffs' cashier testified that they discounted the note for Thompson, and that, when it was discounted, the names stood on the note as they now do. There was no evidence that the note was presented to Mirick & Co. for payment; but there was evidence tending to show that notice of dishonor was given to them, as indorsers, as well as to the defendant.

The defendant contended that Mirick & Co. were to be considered as joint, or joint and several, promisors, and that the defendant was not responsible as indorser, without proof of presentment to them for payment. But it was ruled that they were not to be so considered as promisors, as that presentment of the note to them, and demand of payment of them, were necessary to charge the defendant. A verdict was returned for the plaintiffs, which is to be set aside, and a new trial granted, if the ruling was incorrect.

[Argument not reported.]

HUBBARD, J. It is admitted that the note was not presented for payment to Mirick & Co.; and the question is, whether the omission to do it discharges the indorser.

¹ Changed by the N. I. L. §§ 80, 81.

If the subject now brought before us were a new one, we should hesitate in giving countenance to such an irregularity as to hold that any person whose name is written on the back of a note should be chargeable as a promisor. We should say that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete or within the Statute of Frauds; or that he should be treated, by third parties, simply as a second indorser; leaving the payee and himself to settle their respective liabilities, according to their own agreement. But the validity of such contracts has been so long established, and the course of decisions, on the whole, so uniform, that we have now only to apply the law, as it has been previously settled, in order to decide the present suit.

The first case of this description, of which any mention is made in the reports, is that of *Sumner v. Parsons*, tried before this court in Lincoln County, July Term, 1801. The facts were these: "Parsons wrote his name on a paper and gave it to John Brown, but there was no evidence of the intent, or of any connection in business between them. Brown made a note, on the other side, payable to Jesse Sumner or order, on demand, with interest, and signed it, and thirty days after made a partial payment on it. Sumner then got a writing in these words over the name of Parsons: 'In consideration of the subsisting connection between me and my son-in-law, John Brown, I promise and engage to guaranty the payment of the contents of the within note, on demand.' And he sued Parsons, declaring on the promise, specially stating it and the note, but did not aver any demand on John Brown, or notice to Parsons. In two trials in the Supreme Judicial Court, it was held that Parsons was liable, and that Sumner had a right to fill the indorsement so as to make Parsons a common indorser of the note, with the rights and obligations of such, or a guarantor, warrantor, or surety, liable in the first instance, and, in all events, as a joint and several promisor would be." *Am. Prec. Declarations*, 113. Mr. Dane, who cites it in his *Abridgment*, Vol. I. 416, 417, remarks that "this case was carried as far as any case had gone, and on the review the court was not unanimous; and it has since been questioned;" and we have no doubt with good reason; for the holder of the paper, having himself set out the contract by the words written over the name of the defendant, should have been held by its terms, and the legal effect should have been given to the material word "guaranty." And, in that view of the contract, the promise of Parsons was only to pay after a demand upon Brown for payment and a refusal by him, and of which Parsons should have had notice. But the court must have construed the writing as constituting him an original promisor, and so bound, absolutely, without notice. And, in our apprehension, the

writing of the guaranty over the name of Parsons ought not to have been held as an act obligatory on him; but he should have been treated, if held at all, as an indorser of the note, and, as such, subject to the liabilities, and entitled to the notice, of an indorser. See *Beckwith v. Angell*, 6 Conn. 325, opinion of Hosmer, C. J.

[*Josselyn v. Ames*, 3 Mass. 274, and *Hunt v. Adams*, 5 Mass. 358, s. c. 6 Mass. 519, considered.]

Immediately after, occurred the case of *Carver v. Warren*, 5 Mass. 545. That was on a note made by one Cobb to the plaintiff, and on the back of which the defendant wrote his name; and the plaintiff filled the indorsement, and declared upon it as his promise. The defendant demurred to the declaration, on the ground that this was but a promise to pay the debt of another, and was void for want of consideration. But the court held that, by the pleadings, each promised to pay the same sum, and that the defendant's promise did not import any guaranty or collateral stipulation; and that if the defendant had indorsed as guarantor, and the present indorsement was filled up without his consent, or any authority from him, he should have pleaded the general issue, and on the trial he might have availed himself of this defence. And so the plaintiff had judgment on the demurrer.

[*Hemmenway v. Stone*, 7 Mass. 58, and *White v. Howland*, 9 Mass. 314.]

The case of *Moies v. Bird*, 11 Mass. 436, which succeeded, is substantially like the present. A note was made to the plaintiff, and signed by Benjamin Bird, and the defendant signed his name in blank on the back of the note. The court say, the defendant "leaves it to the holder of the note to write anything over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal; and we think he has a right so to do. If he was a surety, then he may be sued as an original promisor."

In the case of *Baker v. Briggs*, 8 Pick. 130, which was an action to recover the amount of a promissory note made by one Ryan to the plaintiff, the name of the defendant, Briggs, was written on the back of it, and the courts say that, according to several decisions it was right to declare against him as promisor, though he stood in the relation of surety to Ryan, who signed the note on the face of it.

The case of *Chaffee v. Jones*, 19 Pick. 260, was *assumpsit* on a note signed by Israel A. Jones, as principal, and Eber Jones and E. Owen & Sons, as sureties, by which they jointly and severally promised to pay the president, etc., of the Housatonic Bank, or their order; and the plaintiff put his name on the back of the note, in blank. The plaintiff was called upon, after the neglect of the makers,

and he paid it to the bank. The court held that where one, not a promisor nor indorser, puts his name on a note, meaning to make himself liable with the promisor, he is to be regarded as a joint promisor and surety. He is not liable as indorser, for the note is not negotiated, nor a title made to it, through his indorsement; nor as guarantor, there being no distinct consideration; but he means to give security and validity to the note by his credit and promise, and it is immaterial, for this purpose, on what part of the note he places his name. So in *Austin v. Boyd*, 24 Pick. 64, where the defendant's name was, in like manner, on the note, it was held that the party, by thus putting his name on the back, makes himself an original promisor. He intends by it to give credit to the note.

The case of *Samson v. Thornton*, 3 Met. 275, was *assumpsit* on a note made by Benjamin Russell to the plaintiff, and was indorsed by the defendant Thornton; and the declaration charged him as an original promisor. The court there ruled that the defendant, not being the payee of the note, must be held to stand in the character of an original joint promisor and surety.

The case of *Richardson v. Lincoln*, 5 Met. 201, is of the same type. . . . See also *Sumner v. Gay*, 4 Pick. 311.

The same questions have arisen in New York in various cases, and have been decided in a similar manner.¹ They will be found cited in *Story on Notes*, §§ 59, 472-480, where the subject is fully discussed, and the authorities examined.

To hold the party, however, as promisor, where the name alone is written, it must appear that he made the promise at the time when the note itself was made; otherwise, he may either not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved. *Carver v. Warren*, 5 Mass. 545; *Tenney v. Prince*, 4 Pick. 385; *Baker v. Briggs*, 8 Pick. 122, 130; *Oxford Bank v. Haynes*, 8 Pick. 423; *Story on Notes*, §§ 473, 474; *Beckwith v. Angell*, 6 Conn. 315. But that the promise was made at the same time with the note is a fact which is to be presumed when the note is in the hands of a *bona fide* holder, and nothing is shown to the contrary. And, in the present case, the note was offered to the plaintiffs for discount by the maker himself, with the names of Mirick & Co. and Willis on the back of it; showing it, therefore, to have been an original undertaking on their part.

It was contended, in the argument, that Mirick & Co. were merely sureties, and that the plaintiffs had a right to treat them as such, and therefore were not bound to demand payment of them as makers, as a necessary step to enable them to charge the indorser; the relation of promisor, surety, and guarantor being distinct. There is, unquestionably, a distinction between these several undertakings; and always so in regard to a mere guarantor. But as to the subsist-

¹ A mistake. See *Bigelow, Bills and Notes*, 47; *post*, p. 78.

ing relations between a principal and surety, they rarely affect the contract between the creditor and surety. A man may be equally a surety and an original promisor; as where the promise is, I, A B, as principal, and I, C D, as surety, promise to pay; or where the party signs, and adds to his name the word "surety." This does not make him less a promisor. It only defines the relation between him and his co-promisor; and, as promisor, the necessity of a presentment to him is not dispensed with, if the intention of the holder of the note is to charge the indorser. It is not for the holder to choose in what character he will consider the party who has put his name on the note; but he must treat him as sustaining that legal relation which the facts establish. If he put his name on the note at the time it was made, like the case at bar, he is a promisor; if after the making of the paper, he is a surety or a guarantor, according to the agreement upon which he gives his signature. The fixing of the relation of the party, when he enters into the contract, is necessary for the protection of holders, and for guarding the rights of indorsers whose liability is conditional. If it were held otherwise, I do not well see how such contracts could be supported against the objection of being void as within the Statute of Frauds.¹

¹ The Statute of Frauds everywhere requires that the contract shall be in writing; and in some States, as in England, it further requires a recital of consideration. The irregular indorsement is, if anything, a contract of the common law, and, in the case of a bill of exchange, is not enforceable because the contract is not in writing. In *Jenkins v. Coomber*, 1898, 2 Q. B. 168, an action was brought against Alfred Coomber on a bill of exchange in the following form:

"LONDON, Aug. 5, 1897.

£57: 0: 0

Three months after date pay to our order the sum of Fifty-seven pounds for value received.

J. JENKINS & SONS.

To Mr. ARTHUR COOMBER.

Accepted payable at the London and County Bank. ARTHUR COOMBER."

Indorsed "Alfred Coomber," "J. Jenkins & Sons."

It was contended by the plaintiff that Alfred Coomber was liable as an indorser; the defendant's contention was that, if liable at all, his liability was primary, i. e. as surety.

Mr. Justice Wills, in dismissing the action, said:

"The general principle since the Act* of 1882 seems to me to be exactly as it was laid down in *Steele v. McKinlay* (5 App. Cases, 754), and the contract of indemnity on which the plaintiff relies is one which is not recognized by the law merchant, but which arises solely from an agreement between the parties. It is, however, here relied upon as giving a primary liability against the defendant upon this bill of exchange. That, as Lord Watson points out in *Steele v. McKinlay*, will not do. If the agreement exists at all, it must exist as a contract of suretyship, and for that purpose it must satisfy the requirements of the Statute of Frauds."

In the case of a promissory note, the contract will not be enforceable where the statute requires a recital of consideration, and no consideration is recited in the note.

* The Bill of Exchange Act, § 56. The American statute contains the added provisions of the N. L. L. § 81.

SEABURY v. HUNGERFORD.

Supreme Court of New York, October, 1841. 2 Hill, 80.

In others, he is deemed an indorser.¹

ASSUMPSIT. The plaintiff gave in evidence a promissory note as follows: "Knox, March 30, 1837. Six months after date, for value received, we jointly and severally promise to pay Daniel Seabury, or bearer, the sum of one hundred and twenty-five dollars, with interest from date. Justus Pickering." On the back was the defendant's name, "John I. Hungerford, backer, Schoharie." On this evidence the plaintiff claimed to recover. The judge decided that the defendant was to be regarded as an *indorser* of the note, and that the plaintiff must show a demand, and notice of non-payment; that the defendant could not be charged as maker or guarantor without showing that he was privy to the consideration of the note. The plaintiff excepted. A witness for the plaintiff testified that he heard the defendant say that if it had not been for getting his own pay from Pickering, the maker, he, Hungerford, would not have signed the note. This conversation was near where the defendant lived in Schoharie, in October, 1837. The witness went with the plaintiff to demand and get the money on the note. The defendant first said to the plaintiff, "You are too late; you should have come on the 15th of September;" but after looking at the note he said, "You are right." The plaintiff said he had seen Pickering the day before, and could not get the money from him except \$18, which he then paid. There was no proof of a demand and notice at the proper time to charge the defendant as indorser. The judge decided that this evidence was not sufficient to charge the defendant on the ground of his being privy to the consideration of the note; and that the fact that the defendant put his name on the note to enable Pickering to procure the money from the plaintiff did not alter the case—the defendant was an indorser, and entitled to require demand and notice. The plaintiff excepted, and the jury found a verdict for the defendant. The plaintiff now moved for a new trial, on a bill of exceptions.

[Argument reported.]

BRONSON, J. Although the nature of the obligation which the defendant intended to contract was sufficiently manifested by putting his name on the back of the note, he seems to have added the word "backer" for the purpose of declaring still more explicitly that he was to be regarded as an indorser; and his residence was given for the purpose of indicating the place to which notice might be sent in case

¹ This is the rule of the Statute. N. I. L. § 81.

the note should not be paid at maturity by the maker. I infer also from the conversation between the parties about the time the note fell due, that they both regarded the defendant as standing in the character of an indorser and entitled to notice as such. I do not see, therefore, upon what principle he can be charged as maker or guarantor. It would be substituting a new contract for the one which the parties have made.

If the special circumstances which have been mentioned are laid out of view, the result will still be the same. When a man writes his name, without anything more, on the back of a negotiable promissory note, he agrees that he will pay the note to the holder on receiving due notice that the maker, on demand made at the proper time, has neglected to pay it. This is the legal effect of the indorsement, and the case is not open to any intendment, — certainly not to the presumption that the party meant to contract a different obligation. Proof that he put his name on the note for the purpose of giving credit to the maker, or enabling him to raise money upon the paper, only shows that there is a special relation between him and the maker, not between him and the holder. It does not change the nature of the contract of indorsement from what it would be had the note actually passed through his hands in the usual course of business and been indorsed for value. If this be not so, then every accommodation indorser may be treated as a maker or guarantor of the paper.

Now, what did the plaintiff prove for the purpose of obviating the objection that there had been no demand and notice? The defendant said, about the time the note fell due, that if it had not been for getting his own pay from Pickering, the maker, he would not have signed the note. This does not prove that there was originally any agreement or understanding between the plaintiff and the defendant aside from the contract of indorsement, or that they had any communication whatever in relation to the giving or indorsing of the note. The most that can be justly inferred from the admission is, that the defendant indorsed for the accommodation of Pickering, and that his motive for doing so was the expectation of getting a debt which Pickering owed him. But neither the fact of his being an accommodation indorser, nor his motive for becoming such, can affect the present question. The plaintiff had nothing to do with the mode in which Pickering should dispose of the money to be obtained on the note; and whether the defendant did an act of mere benevolence, or whether he expected to derive some personal advantage from the indorsement, cannot alter the nature of his contract.

If we assume that the note was originally passed to the plaintiff, who is named in it as payee, that will not alter the case. The defendant might still have been charged as indorser; and where he may be so charged, he cannot, I think, be made liable in any other form. The note is payable to the plaintiff or bearer, and in its legal effect

was payable to the bearer.¹ The plaintiff might have declared that Pickering made his promissory note payable to bearer, and delivered it to the defendant, who thereupon indorsed and delivered it to the plaintiff, with an averment that payment was demanded of the maker at maturity, and due notice of non-payment given to the defendant. The plaintiff might also have transferred the note by delivery to some third person, and then the holder might have declared in the same way; or he could have alleged that Pickering made his note payable to Daniel Seabury or bearer, that Seabury delivered it to the defendant, who indorsed and delivered it to the holder. But without transferring the note, if the plaintiff had taken the proper steps for that purpose there could be no difficulty in his declaring and recovering against the defendant as indorser. We had occasion to consider this question in *Dean v. Hall*, 17 Wendell, 214, and that case will be found to be entirely decisive of the one at bar. Coleman made his promissory note payable to Howard or bearer, upon the back of which Hall indorsed his name, and the note was then delivered to Howard, the payee named in it. We held that there was no legal difference between a note payable to bearer and one payable to a particular person or bearer; that Howard, the payee, or Dean, to whom he had transferred the note, might either of them have declared and recovered against Hall as indorser; and that they could not charge him in any other character.

If the note had not been negotiable, or if for any other reason the case had been such that the defendant could not, by the exercise of proper diligence, have been charged as indorser, and there had been an agreement that he would answer in some other form, then the plaintiff might have written over the name such a contract as would carry into effect the intention of the parties. When a contract cannot be enforced in the particular mode contemplated by the parties, the courts, rather than suffer the agreement to fail altogether, will, if possible, give effect to it in some other way. But they never make contracts for parties, nor substitute one contract for another. This was, in legal effect, regular mercantile paper, upon which the defendant contracted the obligation of an indorser within the law merchant;² and by that obligation, and no other, he is bound.

It is said that the defendant was privy to the consideration for which the note was given, and therefore liable as maker or guarantor. But it is not enough that the indorser knows what use is to be made of the note, or that he indorses for the purpose of giving the maker credit, either generally or with a particular individual. If the note

¹ Cf. *Bigelow v. Colton*, 13 Gray, 309, post, p. 82; *McTetrich v. Woodrow*, 67 N. H. 174; *Bigelow, Bills and Notes*, 48.

² Cf. *Bigelow v. Colton*, 13 Gray, 309, post, p. 82.

The indorsement in this case was not irregular at all, and this statement is accurate. See opinion of Mr. Justice Wills in *Jenkins v. Coomber*, 1898, 2 Q. B. 168.

is negotiable, the only inference to be drawn from the fact of his putting his name on the back of it is, that he intended to give the maker credit by becoming answerable as *indorser*; and this inference is so strong that it will prevail even where his obligation as indorser cannot be made operative without first obtaining the name of another person to the paper. *Herrick v. Carman*, 12 Johns. 159; *Tillman v. Wheeler*, 17 Johns. 326. Before he can be made liable as maker or guarantor, there must at the least be an agreement that he will answer as such. *Nelson v. Dubois*, 13 Johns. 175. And where a parol agreement to that effect is shown, I do not see how it can be made to take the place of the written contract of indorsement. In other cases the rule is, that when parties have come to a written contract, that is taken as the evidence of their final agreement, and all prior negotiations are merged in it. In *Nelson v. Dubois* the defendant agreed to become *security* for Brundige, and to *guaranty* the payment of a note which B. was about to make to the plaintiff; but when the contract came to be reduced to writing, it took the form of a negotiable promissory note upon which the defendant might have been charged as indorser. That was the final agreement between the parties, and I see no principle upon which the plaintiff could be allowed to abandon the written contract and go back to the prior negotiations for the purpose of charging the defendant as *guarantor*. And although the defendant was charged in that form, the case is not, I think, an authority for the position which it is usually cited to support. The point that the defendant might have been made answerable as indorser was neither taken at the trial nor on the argument; nor was it mentioned by the court; but the contrary was assumed in every stage of the cause. The only objection made at the trial or on the argument was, that the case fell within the influence of the Statute of Frauds. It was assumed that the defendant could only be charged as guarantor, and the objection was that the contract of guaranty should have been written out at the time the defendant put his name on the note. Spencer, J., who delivered the opinion of the court, stated at the outset that the case turned on the point whether the promise was within the Statute of Frauds. He then proceeded to cite cases where the party had been held answerable as guarantor, although the contract had not been written out in full at the time; but they are all cases where he could not have been charged as indorser. *Nelson v. Dubois* is then an authority for the position that one who puts his name in blank on the back of a promissory note may be held liable as maker or guarantor when there is an agreement to that effect, and when he could not be charged as indorser: the case is not within the Statute of Frauds. But it is not an authority for saying that the usual contract of indorsement upon commercial paper can be changed into something else by showing a prior parol agreement to be answerable in some other form. This court could never

have intended to sanction the doctrine that the holder of a negotiable promissory note may abandon the contract in writing actually made by the indorser and substitute another contract in its place.

In any view of the case of *Nelson v. Dubois* it proves nothing against this defendant, for here there was not only a regular contract of indorsement, but there is not a particle of evidence, by parol or otherwise, that the defendant ever made any different agreement. It is impossible to charge him as maker or guarantor. The cases on this subject were so fully considered in *Dean v. Hall*, 17 Wendell, 214, that I do not think it necessary to examine them on the present occasion.

New trial denied.

NELSON, C. J., dissented.

BIGELOW v. COLTON.

Supreme Court of Massachusetts, September, 1859. 18 Gray, 309.

Indorsement in blank by a third person, on an instrument payable to bearer, is not irregular.

ACTION of contract against Aaron Colton as a joint and several maker of this promissory note:

"Great Barrington, July 18th, 1857. Two months after date I promise to pay to the order of myself two hundred and fifty dollars at the Mahaiwe Bank, for value received.

EDWIN HURLBUT."

Upon the back of the note was the signature of Hurlbut, and under it that of Colton; and at the trial in the Court of Common Pleas it appeared that both names were signed before the delivery of the note to the plaintiff; the signature of Hurlbut being made first. BISHOP, J., ruled that the defendant could not be held as a maker, and directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

[Argument not reported.]

BIGELOW, J. A promissory note payable to the order of the maker, and by him indorsed, is in legal effect a note payable to bearer. By placing his name on the back of the note, the maker agrees to pay it to whomsoever may be the holder thereof. Story on Notes, §§ 16, 36 a. Although a note payable to bearer is transferable by delivery, it may also be transferred by the indorsement of any holder. In such case, the indorser incurs the same obligations and liabilities as an

indorser of a note payable to order, and is entitled to demand and notice. Story on Notes, § 132.

This case does not fall within that anomalous class of cases where a third person, neither maker nor payee, puts his name on the back of a note before its indorsement by the payee; but is the ordinary case of an indorsement of a note payable to bearer, the effect of which cannot be varied or controlled by parol proof. *Pierce v. Mann*, 17 Pick. 244; *Howe v. Merrill*, 5 Cush. 80; *Prescott Bank v. Caverly*, 7 Gray, 220.

Exceptions overruled.

ESTES v. TOWER.

Supreme Court of Massachusetts, September, 1869. 102 Mass. 65.

The maker's contract is to pay according to the tenor of the instrument;¹ suit is sufficient demand.

CONTRACT on a promissory note dated February 9, 1853, at North Adams, and payable, thirteen years after date, to the bearer, without any specification of a place of payment. Writ dated February 12, 1866. The officer made return of an attachment of real estate thereon at fifteen minutes past six o'clock in the afternoon of that day. At the trial in the Superior Court, before WILKINSON, J., evidence was introduced tending to prove that the defendant signed the note, which was also signed by Francis N. Rice; and it was in controversy whether or not the defendant was liable thereon as an original promisor, and testimony was offered and rulings were made on that question, which are immaterial to this report.

An attorney at law, called as a witness by the plaintiff, testified that he made the writ on the day of its date, after candle-light, and, as he thought, between five and six o'clock in the afternoon; that the officer sat waiting while he drew it; and that as soon as it was drawn he handed it to the officer, who immediately wrote on it his return of the attachment.

No demand and refusal of payment was proved; the defendant contended that the action was prematurely brought; the judge so ruled, and directed a verdict for the defendant, which was returned; and the plaintiff alleged exceptions.

[Argument not reported.]

GRAY, J. A promissory note entitled to grace is payable on demand at any reasonable time and place on the last day of grace, and, if the maker neglects or refuses payment upon such demand, the note

¹ N. I. L. § 77.

is dishonored and may be put in suit immediately;¹ but if no such demand is made, and he has done nothing amounting to a waiver of it, he has the whole of the day in which to make payment, and is not liable to an action until the expiration of the time within which such demand might have been made upon him. *Gordon v. Parmelee*, 15 Gray, 413. In the case of a note not in terms payable at a bank² or other place of business, the demand may be made at the maker's dwelling-house at any hour at which, having regard to the habits and usages of the community in which he lives, he may reasonably be expected to be in a condition to attend to ordinary business, even as late as eight or nine o'clock in the evening. *Triggs v. Newnham*, 10 Moore, 249; *Farnsworth v. Allen*, 4 Gray, 453. It was therefore rightly ruled at the trial that this action was prematurely commenced.

The case of *Butler v. Kimball*, 5 Met. 94, upon which the plaintiff relies, and in which the maker of a note was held liable, without a previous demand, upon a writ made after sunset on the last day of grace and delivered to an officer on the next day, does not rest upon the ground that suit might be brought immediately after sunset on the last day of grace; but upon the ground that it was reasonably to be inferred that the writ was filled up provisionally and not intended to be used until the next day, when it was delivered to the officer, and that the making of the writ was no more to be deemed the commencement of the action than if the plaintiff, instead of keeping it in his own hands, had delivered it to the officer that night with instructions not to serve it until the next day, or had sent it to the officer, but it had not yet reached him. *Swift v. Crocker*, 21 Pick. 241; *Seaver v. Lincoln*, 21 Pick. 267; *Emerson v. White*, 10 Gray, 351.

In the case at bar, the writ was not only made, but served, before any cause of action had accrued against the defendant.

Exceptions overruled.

¹ See *Kennedy v. Thomas*, 1894, 2 Q. B. 759 [C. A.], *contra*; *Bigelow*, Bills and Notes, 42.

² As to notes payable at a bank, see *Exchange Bank v. Bank of North America*, 132 Mass. 147.

CHAPTER V.

ACCEPTOR'S CONTRACT.

SWOPE v. ROSS.

Supreme Court of Pennsylvania, July, 1861. 40 Penn. State, 186.

Until the drawee of a bill of exchange has accepted it, he is a stranger thereto.¹

ASSUMPSIT upon the following case stated:

Ross Forward gave to Swope & Karns the following instrument of writing:

"SOMERSET, PA., August 18, 1859.

"George Ross & Co., bankers, pay to Swope & Karns or order, ninety days from date, six hundred and sixteen dollars.

ROSS FORWARD."

On or about the 1st of September thereafter, Swope, one of the firm of Swope & Karns, delivered this paper (indorsed Swope & Karns) to the plaintiffs' bank, had the same discounted, and received the money thereon, less the discount, \$16.40. At the time this cheque was given, and when it was discounted at the bank, Ross Forward was one of the firm of George Ross & Co., but went out on the 19th of September, 1859. When the day of payment named in the cheque came round, Forward had no funds in the bank, and the paper was regularly protested for non-payment on the 19th of November, 1859.

If the court be of the opinion that, on the above state of facts, the plaintiffs are entitled to recover, the judgment to be entered in favor of plaintiffs for \$616, with interest from Nov. 9, 1859; otherwise judgment for defendant with costs. Judgment for plaintiffs. Writ of error.

[Argument reported.]

STRONG, J. The question presented by the case stated is quite novel, and we have not been able to find that it has been adjudicated. Undoubtedly the acceptor of a bill of exchange is the principal debtor, and the drawer and indorsers are but sureties. Of course the acceptor, even after payment, cannot sue either the drawer or indorser

¹ N. I. L. § 144.

of the bill unless his acceptance was *supra protest*. His payment of the bill extinguishes it, but the case stated finds that the plaintiffs discounted the bill for the payees before it became payable, not that they accepted it or paid it. Discounting a bill, though it be done by the drawee, is neither acceptance nor payment. Acceptance is an engagement to pay the bill according to its tenor and effect when it becomes due, not before. A bill is paid only when there is an intention to discharge and satisfy it. In *Burbridge v. Manners*, 3 Camp. 194, Lord Ellenborough said "that even payment of a bill before it became due does not extinguish it any more than if it were merely discounted," and added that "payment means payment in due course and not by anticipation." His lordship evidently thought that discounting a bill by a drawee is neither payment nor extinguishment. In *Attenborough v. McKenzie*, in the English Court of Exchequer, 36 Eng. L. & Eq. 562, it was held that, if the acceptor of a bill discounts it, he may reissue it so as to charge the drawer; that nothing will discharge the drawer but payment; i. e., payment when due, or payment for the purpose of discharging and satisfying the bill. Therefore, if the acceptor discounts the bill for the drawer and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an indorsement, although at the time the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor. Nor will the payment of the amount less the discount be deemed a payment of the bill by the acceptor. In that case the holder of the bill took it by indorsement after it was due, from the transferee of the acceptor. The ruling goes to the length that even the accepting drawee of a bill may take it as an indorsee, and as such may issue it. It also decides that he does take it as an indorsee when he discounts it. Can then the drawee of a bill, payable on time, who has discounted it, maintain an action on it against the drawer or indorser if it be protested for non-payment and notice be given? He is not a party to the bill until he has accepted it. Until then, he has not assumed the position of principal debtor, nor undertaken any obligation in regard to it. His discounting has neither paid nor extinguished it, and it is not a promise to pay according to its tenor and effect. Is he precluded from becoming an indorsee by the fact that the bill was directed to him? It seems well settled that the drawee of a bill may accept or pay it, *supra protest*, for honor of the drawer or indorser, and if he takes it up he stands in the position of an indorsee paying full value for it, has the same remedies to which an indorsee would be entitled against all prior parties, and can of course sue the drawer or indorser. *Chitty, Bills*, 375. In such cases the fact that the bill was drawn upon him does not incapacitate him from acquiring the rights of an indorsee. No reason is apparent for a different rule where the

drawee becomes the holder by discounting the bill before its dishonor. Uncertain whether the drawer will put funds into his hands to meet the bill at maturity, he may well refuse to accept, and yet may discount it on the credit of both the drawer and indorser. If he does not accept, he is as much a stranger to it as any other person discounting it for the drawer or indorser; is but purchasing the contract, and the contract thus purchased is that the drawee will pay the bill on presentment, when it shall fall due, or, in case of his failing to do so, that the parties whose names are already upon it will pay, if due notice of its dishonor be given to them. The promise is made by the parties to the bill. The purchaser enters into no engagement.

These views accord with the doctrine laid down in *Desha, Sheppard, & Co. v. Stewart*, 6 Ala. 852, a case which more closely resembles the present than any we have been able to find. In it the Supreme Court of that State ruled that the drawees of a bill may sue the drawer or indorsers after it has been dishonored, even though they obtained the bill before its dishonor; and that until acceptance they are strangers to the bill, and may acquire rights to it, and stand in the same condition as any other holder. It was said that there is no legal presumption if the drawer comes into possession of the bill previous to its dishonor, that he takes it with the obligation to accept.

Such being in our opinion the law, it was not error that the Court of Common Pleas gave judgment for the plaintiff upon the case stated. The fact is not distinctly found that notice of dishonor of the bill was duly given to the defendants, but it was conceded on the argument that such was the fact, and that such is the meaning of the case stated. The judgment is

'Affirmed.

[Acceptances, apart from acceptance for honor, may be classified as acceptance proper and virtual acceptance.]

SPEAR v. PRATT.

Supreme Court of New York, May, 1842. 2 Hill, 589.

Acceptance proper is the assent of the drawee to the drawer's order; this assent, by the Statute, must be in writing, on the bill.¹

ASSUMPSIT against the drawee as acceptor of a bill of exchange, the drawee having simply written his name across the instrument. The statutes of New York, which govern the case, require acceptance to be in writing and signed by the acceptor. Judgment for the plaintiff by direction of the judge. Motion for a new trial.

¹ N. I. L. §§ 149, 150, and see §§ 156 to 159, inclusive, and *Bigelow, Bills & Notes*, ch. v. § 2, as to qualified acceptance.

[Argument not reported.]

COWEN, J. Any words written by the drawee on a bill, not putting a direct negative upon its request, as "accepted," "presented," "seen," *the day of the month*, or a direction to a third person to pay it, is *prima facie* a complete acceptance, by the law merchant. Bayley on Bills, 163, Am. ed. of 1836, and the cases there cited. Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law merchant as a written acceptance, — a signing by the drawee. "It may be," says Chitty, "merely by writing his name at the bottom or across the bill;" and he mentions this as among the more usual modes of acceptance. Chit. on Bills, 320, Am. ed. of 1839.

It is supposed that the rule has been altered by 1 Rev. St. 757, 2d ed., § 6. This requires the acceptance to be *in writing*, and *signed* by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a *writing* and *signing*. The statute contains no declaration that it should be considered less. An indorsement must be *in writing* and *signed*; yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any contract. The customary import of a word, by reason of its appearing in a particular place and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most labored periphrase. It is said the revisers, in their note, refer to the French law as the basis of the legislation which they recommended; and that the French law requires more than the drawee's name, — the word *accepted*, at least. That may be so; but it is enough for us to see that both the terms and the spirit of the act may be satisfied short of that word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance.

New trial denied.

DAVIS v. CLARKE.

Queen's Bench of England, Trinity, 1844. 6 Q. B. 16.

Apart from acceptance for honor, the drawee alone may accept.

ASSUMPSIT. The first count stated that "one John Hart," on 8th March, 1838, "made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to him or his order £100," value received, at twelve months after

date, which had elapsed, etc., "and the defendant then accepted the said bill, and the said John Hart then indorsed the same to the plaintiff;" averment of notice to defendant, promise by him to pay plaintiff, and that he did not pay. There was also a count on an account stated.

The first plea denied the acceptance; the second the promise; the third alleged a discharge of defendant by the Insolvent Debtors' Court. Replication joining issue on the first two pleas, and traversing the discharge alleged in the third, on which issue was joined.

On the trial a written paper, in the following terms, was given in evidence for the plaintiff:

"£100.

LONDON, 8th March, 1838.

Twelve months after date pay to me or my order one hundred pounds, value received.

JOHN HART.

To Mr. JOHN HART."

Across the face of this instrument was written, in defendant's hand, "Accepted. H. J. Clarke, payable at 319 Strand."

No other evidence being produced, the court directed a nonsuit. Case argued on a rule *nisi* for a new trial.

[Argument reported.]

LORD DENMAN, C. J. There is no authority, either in the English law or the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another. We must take it on this instrument that the defendant is different from the party to whom it is addressed. *Polhill v. Walter*, 3 B. & Ad. 114, and *Jackson v. Hudson*, 2 Campb. 447, are authorities showing that the defendant here cannot be sued as acceptor. In *Jackson v. Hudson*, Lord Ellenborough treated an acceptance by a party not addressed as "contrary to the usage and custom of merchants."

PATTESON, J. No previous case seems to be exactly like this. In *Jackson v. Hudson*, 2 Campb. 447, there was one acceptance by the party to whom the bill was addressed, prior to the acceptance by the defendant. In *Gray v. Milner*, 8 Taunt. 739, no party was named in the address; and I must say that the decision in that case appears to me to go to the extremity of what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed. But here another person, the drawer himself, is named in the address. I do not know that a party may not address a bill to himself, and accept,

though the proceeding would be absurd enough. Then it is said that the defendant is estopped; but that cannot be supported where the instrument shows, on its face, that he cannot be the acceptor.

WILLIAMS, J. The only question is, whether the defendant is such an acceptor as is described in the declaration; that is, of a bill of exchange directed to him. No doubt this can be so only where he is the drawee; but here the bill is not addressed to the defendant at all. This is therefore not an acceptance within the custom of merchants.

COLERIDGE, J. The safe course is to adhere to the mercantile rule that an acceptance can be made only by the party addressed, or for his honor. Here the last is not pretended, and the first cannot be presumed. If the John Hart addressed is different from the John Hart who draws, there is still no acceptance; if the same, then the instrument is a promissory note, and not a bill of exchange.¹

Rule discharged.

COOLIDGE v. PAYSON.

Supreme Court of the United States, February, 1817. 2 Wheat. 66.

Virtual acceptance is, *first*, acceptance on a separate paper,² or is a promise to accept, followed in either case by a purchase for value on the faith thereof.³

ACTION by the holders of a bill of exchange against the acceptors. The facts appear in the opinion.

[Argument not reported.]

MARSHALL, C. J. This suit was instituted by Payson & Co., as indorsers⁴ of a bill of exchange, drawn by Cornthwait & Cary, payable to the order of John Randall, against Coolidge & Co., as the acceptors.

At the trial, the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bills going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial, it appeared that Coolidge & Co. held the proceeds

¹ N. I. L. § 147.

² *Id.* §§ 151, 152.

³ N. I. L. § 151.

⁴ Apparently a slip for indorsees.

of part of the cargo of *The Hiram*, claimed by Cornthwait & Cary, which had been captured and libelled as lawful prize. The cargo had been acquitted in the district and circuit courts; but from the sentence of acquittal the captors had appealed to this court. Pending the appeal, Cornthwait & Co. transmitted to Coolidge & Co. a bond of indemnity, executed at Baltimore, with scrolls in the place of seals, and drew on them for \$2700. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co. and protested for non-acceptance. After its protest, Coolidge & Co. wrote to Cornthwait & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say: "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your State. It will, therefore, be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for \$2000 will be honored."

On the same day, Coolidge & Co. addressed a letter to Mr. Williams in which, after referring to him the question respecting the legal obligations of the scroll, they say: "You know the object of the bond, and, of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?"

In his answer to this letter Williams says: "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which the letter was written, Cornthwait & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter-book the letter he had written.

Two days after this, the bill in the declaration mentioned was drawn by Cornthwait & Cary, and paid to Payson & Co. in part

of the protested bill of \$2700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict; but the court instructed the jury, that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwait & Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwait & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action; and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co. in their letter to him.

To this charge the defendants excepted; a verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwait & Cary contains no reference to their letter to Williams, which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwait & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwait & Cary to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1663, the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments

and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case and that under the consideration of the court no essential distinction is perceived. But it is contended that the authority of the case of *Pillans and Rose v. Van Mierop and Hopkins* is impaired by subsequent decisions.

In the case of *Pierson v. Dunlop et al.*, Cowp. 571, the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord Mansfield, in delivering his opinion, contradict those laid down in *Pillans and Rose v. Van Mierop and Hopkins*. His lordship observes: "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of *Pillans and Rose v. Van Mierop and Hopkins* had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of *Pierson v. Dunlop* certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Lord Mansfield alludes, must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "accompanied with circumstances;" but it is not said that the answer must contain those circumstances. In the case of *Pierson v. Dunlop* the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill which

a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of *Mason v. Hunt*, Doug. 296, Lord Mansfield said, "There is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawee, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer or any other person may show upon the exchange"? It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans v. Van Mierop* the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson and another v. Collings*, 1 East, 98, Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established. In the case of *Johnson v. Collings*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorsee. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Lord Mansfield, in the case of *Pierson v. Dunlop*; and Lord Kenyon said, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law, and he doubted whether it did not even go beyond it." In *Clark and others v. Cock*, 4 East, 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions

which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter to be a virtual acceptance. It is true, in the case of *Clark v. Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in *Pillans and Rose v. Van Mierop and Hopkins*, the letter was written before the bill was drawn.¹

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is, that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.² This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed with costs.

Judgment affirmed.

EXCHANGE BANK OF ST. LOUIS v. RICE.

Supreme Court of Massachusetts, March, 1871. 107 Mass. 37.

(See 98 Mass. 288.)

A promise to accept, falling short of virtual acceptance, may make a common-law contract, provided there is consideration and privity of contract.

APPEAL from a judgment for the defendant in contract on the following agreed statement of facts:

¹ N. I. L. § 152.

² The Statute speaks only of written promises made *before* the bill is drawn; this is not to be taken as meaning that a written promise made *after* the bill was drawn, may not be treated by the holder as an acceptance, if he elects so to treat it, provided, of course, that he has taken the bill in reliance thereon. "It is a settled rule that a promise in writing to accept a bill of exchange, drawn or to be drawn, is a virtual acceptance in favor of a person to whom the promise is shown and who takes the bill on the credit of such promise. This subject was carefully considered by the court in the recent case of *Exchange Bank of St. Louis v. Rice*, 98 Mass. 288, and it is sufficient to refer to the discussion in that case." Morton, J., in *Central Savings Bank v. Richards*, 109 Mass. 413, 414. The promise in this case was sent by telegraph.

"On March 8, 1865, John P. Hill, at St. Louis, drew on the defendants, commission merchants in Boston, a draft for \$3300, payable thirty days after date to the order of R. R. Pitman & Co., and containing on its face a memorandum in the terms following: 'against 12 bales cotton.' On the same day the draft was indorsed to and discounted in the usual course of business by the plaintiffs, and on March 15 was presented by them to the defendants, at Boston, who caused it to be noted for non-acceptance. On March 8, Hill wrote to the defendants as follows: 'I ship you to-day per Merritt's Express 12 bales, weighing 5489 pounds, on which I have drawn on you at 30 days for \$3300.' To this letter the defendants replied on March 14 as follows: 'We now have the pleasure to acknowledge your favor of the 8th. Your shipment 12 bales of cotton per Merritt's Express will receive due attention. Bill of lading not at hand. Your draft for \$3300 is excessive, particularly as we shall have no margin on previous shipments, as the market now looks. We will honor the same, but shall expect you, on receipt of this, to make us shipment of cotton to cover the margin.' And on March 15 they again wrote to Hill as follows: 'Market for cotton continues weak. Have no bill lading 12 bales reported as shipped yesterday, and we have felt obliged therefore to have your draft for \$3300 noted for non-acceptance. When bill lading is received, will accept draft.' The said bill of lading of the cotton ran to the defendants or order, and was received by them March 17, 1865.

"The defendants' letter of March 15 was shown to the plaintiffs by R. R. Pitman & Co., March 22, 1865. The plaintiffs thereupon procured said letter, and the duplicate bill of lading, of Pitman & Co., and on March 27 again presented the draft, with the defendants' said letter and the duplicate bill of lading attached, to the defendants for acceptance. But the defendants declined to accept the same, and afterwards declined to pay, and they have never paid the same or any part thereof, and the same was duly protested for non-acceptance and non-payment. The twelve bales of cotton were received by the defendants on April 17, and were sold by them on April 21 for \$1349 net, which sum they credited in their account with Hill, upon which a balance then was and still is due to the defendants."

[Argument reported.]

GRAY, J. It has already been decided in this case, upon proof of substantially the same facts which are now agreed by the parties, that the plaintiffs could not sue the defendants as acceptors of the draft, because their promise to the drawer to accept it, having been made after the draft had been negotiated to the plaintiffs, did not amount to an acceptance; and the memorandum at the foot of the draft, that it was drawn against twelve bales of cotton, could have no more

effect to charge the defendants as acceptors than the mere signature of the drawer, which of itself always imports a promise that he will have funds in the hands of the drawee to meet the draft. 98 Mass. 288.

The defendants' promise to the drawer to accept the draft was a mere *chose in action*, not negotiable, and upon which no one but he to whom it was made could maintain an action. Worcester Bank v. Wells, 8 Met. 107; Luff v. Pope, 5 Hill, 413, and 7 Hill, 577.

The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this Commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it.

The unguarded expressions of Chief Justice Shaw in Carnegie v. Morrison, 2 Met. 381, and Mr. Justice Bigelow in Brewer v. Dyer, 7 Cush. 337, to the contrary, on which the learned counsel for the plaintiffs relied at the argument, were afterwards, and while those two distinguished judges continued to hold seats upon this bench, qualified, the limits of the doctrine defined, and a disinclination repeatedly expressed to admit new exceptions to the general rule, in unanimous judgments of the court, drawn up by Mr. Justice Metcalf, and marked by his characteristic legal learning and cautious precision of statement. Mellen v. Whipple, 1 Gray, 317; Millard v. Baldwin, 3 Gray, 484; Field v. Crawford, 6 Gray, 116; Dow v. Clark, 7 Gray, 198. Those judgments have since been treated as settling the law of Massachusetts upon this subject. Colburn v. Phillips, 13 Gray, 64; Flint v. Pierce, 99 Mass. 68.

The first and principal exception stated by Mr. Justice Metcalf to the general rule consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly, or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. That class of cases, as was pointed out in 1 Gray, 322, includes Carnegie v. Morrison and most of the earlier cases in this Commonwealth, as well as the later cases of Frost v. Gage, 1 Allen, 262, and Putnam v. Field, 103 Mass. 556.

The only illustration which the decisions of this court afford of Mr. Justice Metcalf's second class of exceptions is Felton v. Dickinson, 10 Mass. 287, in which it was held, in accordance with a number of early English authorities, and hardly argued against, that a son might sue upon a promise made for his benefit to his father. Those cases, with

the proposition on which they have sometimes been supposed to rest, that, by reason of the near relation between parent and child, the latter might be thought to have an interest in the consideration and the contract, and the former to have entered into the contract as his agent, are not now law in England. *Tweddle v. Atkinson*, 1 B. & S. 393; *Addison on Con.* (6th ed.) 1040; *Dacey on Parties*, 84. And this case does not require us to consider whether they ought still to be followed here.

The third exception admitted by Mr. Justice Metcalf is the case of *Brewer v. Dyer*, 7 Cush. 337, in which the defendant made a written promise to the lessee of a shop to take his lease (which was under seal) and pay the rent to the lessor according to its terms, entered into possession of the shop with the lessor's knowledge, paid him the rent quarterly for a year, and then before the expiration of the lease left the shop, and was held liable to an action by the lessor for the rent subsequently accruing. That case may perhaps be supported on the ground that such payment and receipt of the rent, after the agreement between the defendant and the lessee, warranted the inference of a direct promise by the defendant to the lessor to pay the rent to him for the residue of the term. See *McFarlan v. Watson*, 3 Comst. 286. It certainly cannot be reconciled with the later authorities without limiting it to its own special circumstances, and affords no safe guide in the decision of the present case.

The plaintiffs are then obliged to fall back upon the first exception to the general rule. But they fail to bring their case within that exception or within any of the authorities to which they have referred us.

In *Carnegie v. Morrison*, 2 Met. 381, the defendants, having funds in cash or credit of the plaintiffs' debtor, gave him a letter of credit, which was shown to the plaintiffs, and on the faith of which they drew the bill for the amount of which they sued the defendants; and the drawing of that bill, whereby they made themselves liable to the drawee¹ thereof, was a consideration moving from them. In *Lilly v. Hays*, 5 Ad. & E. 548; s. c. 1 Nev. & Per. 26, the defendant, as the jury found, had authorized the plaintiff to be told that the defendant had received the money to his use, and thus promised the plaintiff to pay it to him. So in *Walker v. Rostron*, 9 M. & W. 411, the defendant had promised the plaintiff to pay the sum in question. And the rule established by the modern cases in England, as laid down in the text books cited for the plaintiffs, does not permit the person for whose benefit a promise is made to another person from whom the only consideration moves to maintain an action against the promisor, unless the latter has also made an express promise to the plaintiff, or the promisee acted as the plaintiff's agent merely. *Met. Con.* 209;

¹ A slip for payee.

Addison on Con. (6th ed.) 630, 1041; Chit. Con. (8th ed.) 53. Where the promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name on the promise made to his agent. *Sims v. Bond*, 5 B. & Ad. 389; s. c. 2 Nev. & Man. 608; *Huntington v. Knox*, 7 Cush. 371; *Barry v. Page*, 10 Gray, 398; *Hunter v. Giddings*, 97 Mass. 41; *Ford v. Williams*, 21 How. 287.

In the case at bar the plaintiffs had acquired no title in the cotton against which the draft was drawn. The bill of lading was not attached to the draft, or made payable to the holder thereof, or delivered to the plaintiffs. The case is thus distinguished from *Allin v. Williams*, 12 Pick. 297, and *Michigan State Bank v. Gardner*, 15 Gray, 362, cited at the argument. The cotton was not of sufficient value to pay the draft, and the balance of account between the defendants and the drawer, at the time of their receipt and sale of the cotton, and ever since, was in favor of the defendants. There is no ground, therefore, for implying a promise from the defendants to the plaintiffs to pay to them either the amount of the draft or the proceeds of the cotton. *Tiernan v. Jackson*, 5 Pet. 580; *Cowperthwaite v. Sheffield*, 1 Sandf. 416, and 3 Comst. 243; *Winter v. Drury*, 1 Selden, 525; *Yates v. Bell*, 3 B. & Ald. 643. The plaintiffs did not take the draft, or make advances, upon the faith of any promise of the defendants, or of any actual receipt by them of the cotton or the bill of lading, but solely upon the faith of the drawer's signature and implied promise that the defendants should have funds to meet the draft. The whole consideration for the defendants' promise moved from the drawer, and not from the plaintiffs. And the defendants made no promise to the plaintiffs. Their only promise to accept the draft was made to Hill, the drawer, after the draft had been negotiated to the plaintiffs; and there is no proof that the defendants authorized that promise to be shown to the plaintiffs, or that Hill, to whom that promise was made, was an agent of the plaintiffs. His relation to them was that of drawer and payee, not of agent and principal. To infer, as suggested in behalf of the plaintiffs, that he was their agent in receiving the defendants' promise, so that they might sue thereon in their own name, would be unsupported by any facts in the case, and would be an evasion of the rules of law, which will not allow any person who took the draft before that promise was made to maintain an action upon that promise either as an acceptance or a promise to accept.

Judgment for the defendants.

NOTE. — In many of the States one for whose benefit a promise is made may sue upon it though he was not privy to the promise or to the consideration. But that, in so far as it is received doctrine, is received as doctrine of the common law, and not, it is apprehended, as doctrine of the law merchant

applicable to cases like that *supra*. And in any event the promise so treated would not be treated, further, as negotiable.

One's rights may, generally speaking, be transferred to another; but the right of the drawer of a bill of exchange or of a cheque to have his draft honored, where he has such a right, cannot be transferred with the draft to the holder of the same; otherwise there would be nothing, or next to nothing in the rule of the law merchant that the drawee of a bill or cheque is and can be under no liability to the holder (apart from a sufficient promise to him to accept) until he has accepted the one or certified the other. Nor can the circumstance that the drawee may have promised the drawer that he will honor the draft make any difference, where the drawer is not an agent of the holder; for in the case supposed he was bound to honor the draft, so that the promise has added nothing to the case.

Of course this is not saying that this particular right of the drawer may not pass to an assignee in bankruptcy or insolvency; that is a very different thing.

HENRIETTA NATIONAL BANK *v.* STATE NATIONAL BANK.

Supreme Court of Texas, May, 1891. 80 Texas, 648.

E. g. in the case of a cheque of which there cannot be acceptance;¹ or in case of an incomplete description of the instrument in the promise.

ACTION on a promise to pay a cheque.

[Argument reported.]

GAINES, Assoc. Justice. This suit was brought by the appellee to recover of the Henrietta National Bank and Frank Brown, as its receiver, the amount of a cheque drawn upon it by E. F. and W. S. Ikard.

On the 22d of July, 1887, E. F. and W. S. Ikard drew a cheque on the defendant bank in favor of one T. F. West for \$1800. West indorsed and delivered it to one Atkinson, who on the next day presented it to the cashier of the plaintiff bank at Fort Worth with the request that he cash it. The cashier immediately telegraphed the defendant bank as follows: "Will you pay E. F. and W. S. Ikard's cheque for \$1800 on presentation?" The cashier of the defendant bank on the same day replied by telegram, "Yes; will pay the Ikard cheque." Upon the receipt of this telegram the plaintiff discounted the paper, and the holder transferred it to the bank by indorsement and delivery. The cheque was immediately sent by

¹ Cf. N. I. L. § 204. "Where a cheque is certified by the bank on which it is drawn the certification is equivalent to acceptance." This is true only for certain special purposes. Certification and acceptance are not one and the same for all purposes. See Bigelow, Bills and Notes, 67.

mail to the defendant bank with a request to remit the amount to the plaintiff. The letter reached Henrietta on Sunday, and on Monday before banking hours the directors of the defendant bank determined to suspend payment, and thereafter its doors were not opened for regular business.

The court having given judgment for the plaintiff for the full amount of the cheque and interest, and the defendants having appealed, they now complain in effect that the correspondence by telegraph between the two banks did not sufficiently describe the cheque so as to make the promise of the defendant bank an acceptance. The authority mainly relied upon by appellants' counsel in support of their contention is the case of *Coolidge v. Payson*, 2 Wheat. 66. In that case Chief Justice Marshall says: "Upon a review of the cases which are reported this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." The doctrine was re-affirmed in the same court in the cases of *Schimmelpennick v. Bayard*, 1 Pet. 284, and *Boyce v. Edwards*, 4 Pet. 111, and has been frequently followed in other courts. Whether according to the rules laid down the correspondence should show any more than the amount and character of the bill as to the time of payment we need not here inquire, though it would seem that such a description ought to be sufficient according to the most rigid rule recognized by any court.

The rule, however, applies only to a case in which it is sought to charge the defendant as the acceptor of the bill. Cases may arise in which the party who has promised to accept may be held liable upon the promise, although such promise may not be deemed equivalent to a formal acceptance. A practical difference between an action upon an acceptance and one upon a promise to accept is that the former may be brought by the holder of the bill, while the latter suit can only be maintained by the party to whom the promise is made. In this case the promise to pay the bill¹ was made directly to the plaintiff, and it was upon the faith of that promise that the cheque was discounted. The suit is not brought upon an alleged acceptance. The petition states the facts in detail and seeks a recovery for the breach of the promise to pay the cheque. In *Boyce v. Edwards*, *supra*, the Supreme Court of the United States says: "The distinction between an action on a bill as an accepted bill and one founded on a breach of promise to accept seems not to have been adverted to. But the evidence to support the one or the other is materially different. To maintain the former, as has already been shown, the promise must

¹ A slip, it seems, for cheque.

be applied to the particular bill alleged in the declaration to have been accepted. In the latter the evidence may be of a more general character, and the authority to draw may be collected from circumstances and extended to all bills coming fairly within the scope of the promise." It is clear that the promise in the case before us was sufficiently definite to support an action for a failure or refusal to pay the cheque described in the petition, if not sufficiently specific to authorize its being treated as an acceptance.¹

The cheque offered in evidence contained the character and figures "\$1800.00," but in the body a line appeared to have been drawn through the word "hundred." If the word was intended to be erased, it was a cheque for \$18 only; if not, it was a cheque for \$1800. The line appears to have been drawn along the top of the word, rather than through it, and it is not at all clear that even without explanation it should be held to be an erasure. The member of the firm who drew the cheque testified that it was intended to be a cheque for \$1800, and that he thought the line was upon the blank when the cheque was written. The circumstances attending the whole transaction leave no doubt that the purpose was to draw a cheque for the amount claimed by the plaintiff, and that the line was either upon the paper when the cheque was drawn and was not discovered, or that it was subsequently placed there by some accident. That it was competent to prove that a mark of this character was not intended as an erasure, especially when the figures in the margin tend to show the same fact, we have no doubt. Sharswood's Starkie on Ev. 500. The defendants introduced testimony tending to show that a prudent banker would not have paid the cheque, at least without inquiry as to the intention of the drawers in executing it. This may be true, but so far as this case is concerned it is a fact of no importance. It was nevertheless the duty of the defendant bank to pay the cheque. An inquiry would have shown beyond doubt that it was a cheque for \$1800, and though the apparent erasure may have justified a delay of a reasonable time to make inquiry, it did not justify a final refusal to pay.

We find no error in the judgment, and it is

Affirmed.

¹ If treated as an acceptance, it could have been only acceptance of a cheque, a very different thing from acceptance of a bill of exchange. This aspect of the case might have been shortly disposed of by saying that there could not be acceptance of a cheque. See Bigelow, Bills and Notes, 67.

PUTNAM NATIONAL BANK v. SNOW.

Supreme Court of Massachusetts, November, 1899. 172 Mass. 569; 52 N. E. Rep. 1079.

Or cases of oral promises, where the Statute requires acceptance to be in writing.

CONTRACT, in nine counts, against William M. Snow and Edward A. Snow, copartners as Snow and Company. The ninth count, which is the only one material to be stated, alleged that in 1894 the defendants entered into an agreement with Robert Long, by which he was to ship oranges from Florida to them in Boston, and in consideration therefor the defendants agreed with Long in writing that as shipments of oranges were made, he might draw upon the defendants for an amount equal to \$1.10 for each box of oranges so shipped, and that they would accept and pay such drafts, and the defendants also promised the plaintiff that they would accept and pay such drafts; and that on December 13 and 15, 1894, Long shipped a large number of boxes of oranges to the defendants, and made seven bills of exchange upon the defendants payable to the order of Long, for a sum amounting to \$1.10 for each box of oranges so shipped, and Long indorsed the drafts to the plaintiff, which discounted the same, relying upon the written and verbal promise of the defendants to accept the same, and duly presented the same to the defendants for acceptance and payment, but the defendants refused to accept or to pay them.

Trial in the Superior Court without a jury, before BOND, J., who found for the plaintiff, and the defendant alleged exceptions.

[Argument not reported.]

MORTON, J. The finding was for the plaintiff on the ninth count for the three drafts that were drawn for oranges from the "Hard Bargain Grove" at \$1.10 per box, and the exception is to the refusal to give the rulings requested so far as they related to that count. The other counts and the rulings relating to them are immaterial.

The ninth count was upon a promise to accept, and alleged in substance a promise in writing by the defendants to Long to accept and pay drafts drawn by him on them equal to \$1.10 per box of oranges shipped, and also a verbal promise to the plaintiff to accept and pay such drafts, and that, relying on the written and verbal promises, the plaintiff discounted the drafts in suit for Long, and upon presentation the defendants refused to accept or pay them.

One question is whether there was any evidence to warrant the finding. The letters of October 8 and November 30 from the defendants to Long, which were shown by him to the plaintiff's cashier, plainly imply authority on the part of Long, if they do not expressly confer it, to draw on the defendants for the fruit that he was to ship.

There was also evidence tending to show that one of the defendants told the plaintiff's cashier, in substance, that Long was to purchase and ship fruit for his house, that he had authority to draw on the house at Boston, and that his drafts would be honored; and later in the trial this defendant testified, amongst other things, "that there was an agreement, as to the oranges from this grove, that Snow and Company would advance \$1.10 per box, while Long should keep his account 'margined up.'" The letter of November 30 also spoke of a draft at the rate of \$1.10 per box. Long denied that anything was said to him about keeping his account margined up, and further testified "that he drew many drafts on the defendants, . . . which were discounted with the plaintiff bank and paid by Snow and Company, during the months of October, November and December, 1894." We think that there was evidence warranting a finding that Long had authority to draw the drafts in question, and that the plaintiff discounted them on the faith of assurances made to it by the defendants that drafts drawn by Long would be accepted and paid.

It is clear, that, in the absence of any statute to the contrary, an oral acceptance of an existing bill of exchange is valid in this country, and that an indorsee of a bill so accepted may maintain an action on such acceptance against the acceptor.¹ *Carnegie v. Morrison*, 2 Met. 381; *Exchange Bank v. Rice*, 98 Mass. 288; *Pierce v. Kittredge*, 115 Mass. 374; *Cook v. Baldwin*, 120 Mass. 317; *Coolidge v. Payson*, 2 Wheat. 66; *Townsley v. Sumrall*, 2 Pet. 170; *Russell v. Wiggin*, 2 Story, 213; *Spaulding v. Andrews*, 48 Penn. St. 411; *Bissell v. Lewis*, 4 Mich. 450; *Nelson v. First National Bank*, 48 Ill. 36. This was formerly the law in England, but it is now otherwise. It is clear also that for the breach of an oral or written promise to accept a non-existing bill an action will lie by the holder of a bill drawn pursuant to such promise and taken by him on the faith of it.² *Boyce v. Edwards*, 4 Pet. 111, 122, 123; 1 Dan. Neg. Instr. § 559; 4 Am. & Eng. Encyc. of Law (2d ed.), 238, 239. See cases *ubi supra*.

Whether an oral promise to accept a non-existing bill constitutes a virtual acceptance of it when drawn is a question on which the cases are not in entire accord, and which we have no occasion to consider here. See *Storer v. Logan*, 9 Mass. 55, 58. The ninth count, as has been observed already, is a count upon a promise to accept, and not upon an acceptance. We discover no error in the refusals to rule as requested.

Exceptions overruled.

¹ N. I. L. § 149, requires the acceptance to be in writing.

² But to enable the plaintiff to recover, the promise must be made to the plaintiff or his agent; was such the fact as to the written promise in this case?

PLUMMER v. LYMAN.

Supreme Court of Maine, 1860. 49 Me. 229.

But this common-law contract may be unenforceable because of the Statute of Frauds.

ON report, by DAVIS, J.

ASSUMPSIT upon an order in the following form :

“ 224.

CUMBERLAND, Dec. 17th, 1857.

Messrs. Lyman, Marrett & Co.,— Six months after date, please pay to Plummer & Gerry two hundred and twenty-four dollars, and charge the same to my account.

DAVID SPEAR.”

The facts are stated in the opinion. The evidence was reported to the full court, who were to draw such inferences as a jury might, and to enter a nonsuit or default, as the law should require.

[Argument reported.]

TENNEY, C. J. The action is upon an alleged verbal promise, made by the defendants, that they would accept an order to be drawn on them by David Spear, in favor of the plaintiffs; and the cause of action alleged, is a failure to comply with the promise.

It was admitted that, in the summer of 1857, David Spear was building a vessel at Cumberland, and all the lumber for which the order was given by him was furnished by the plaintiffs, and put by him into the vessel, which was launched on Wednesday, Dec. 16, 1857, about noon, and was brought up to Portland the following Saturday evening, about eight or nine o'clock. No question is made that the plaintiffs had a lien on the vessel under the statute.

It appears from the testimony of Jesse Plummer, one of the plaintiffs, which is the most favorable evidence for them, that the defendants, having made to Spear large advances to aid him in building the vessel, which were equal, or nearly equal to the full value of the same, and they having, as they claimed, the legal title of the vessel for the security of the payment of such advances, were unwilling that the plaintiffs should enforce their lien against the vessel. One of the defendants being solicited on the part of the plaintiffs, to pay the amount of the claim of the latter against Spear, said, if they would obtain his order, as evidence of his approbation that the payment should be made, they would accept it. Soon after, the witness obtained the order of Spear on the defendants, not negotiable, payable in six months, for the balance of their claim, payment of the sum of two hundred dollars having been made by Spear at the time he gave

the order, and the plaintiffs gave a receipt for the account. This order having been shown to the defendants by the witness, and they being requested to accept it, refused to do so. This was after the vessel was launched, but more than two full days before the lien would expire.

It is regarded as well settled by our law, that a written promise to accept a non-existing bill operates as an acceptance, provided the bill be drawn within a reasonable time; but a verbal promise to accept a non-existing bill has not been treated as valid. *Coolidge v. Payson*, 2 Wheat. 66; *Weston v. Clements*, 3 Mass. 1; *Chitty on Bills*, 312, note (g).

It is insisted for the defendants, that the promise in the case before us, if made as alleged, is within the Statute of Frauds, it being at most a verbal agreement to accept an order to pay a debt of another.

The testimony does not disclose a case of a promise on the part of the defendants to accept an order of Spear on them, as the consideration of a discharge of the plaintiffs' lien on the vessel; or a promise to discharge it; or for giving to Spear a receipt by the plaintiffs of their claim; or that they signified a readiness to make the discharge of the lien, at the time they presented the order to the defendants for acceptance, and a demand on them to accept it; or that they informed them that they had given to Spear a receipt of their claim. But the cause relied upon in support of the action is a naked promise, that the order of Spear would be accepted.

The acceptance by the defendants of such an order of Spear on them as would discharge the account against him, would, by operation of law, discharge the lien; but this would not be the consideration of the previous verbal promise of the defendants to accept an order, not then drawn, and which might never be drawn, to pay the debt of Spear, when such discharge of the account was not a condition to the acceptance of the order.

The case differs from that of *Townsley v. Sumrall*, 2 Pet. 170, relied upon by the plaintiffs, which was a promise to accept bills and not performed, goods having been previously received by the defendant to the amount of the bills promised to be accepted when they should be drawn. This was held to be a promise, not to pay the debt of another, but the debt of the defendant himself, — damage to the promisee furnishing as good a consideration as a benefit to the promisor.

It is not easy to perceive that the refusal to accept the order by the defendants was injurious to the plaintiffs. The receipt to Spear was valid only so far as the plaintiffs received actual payment. The order, not being accepted and not negotiable, was no discharge of that part of the account to which it was intended to apply, as between the plaintiffs and Spear. The receipt could be explained, and the plaintiffs could not be injuriously affected thereby. The defendants refused

to accept the order as they had promised. They had no knowledge of the receipt when they refused to accept the order. They were not misled by the receipt, and had no reason to suppose that the lien was discharged; and they certainly could not claim an advantage from the receipt, as being a discharge of the lien, more than could Spear, as being the discharge of the balance of his debt. The plaintiffs did not treat the receipt as a discharge of the debt, or of the lien on the vessel, inasmuch as, after the defendants' refusal to accept the order, they took out a process in order to enforce the lien by attachment, and were prevented from doing it by their own delay.

The promise of the defendants, relied upon, appertained to the debt of another, and not to their own, and is not a foundation in law for the action.

Plaintiff nonsuit.

APPLETON, CUTTING, GOODENOW, DAVIS, and KENT, JJ., concurred.

HOUGH v. LORING.

Supreme Court of Massachusetts, April, 1834. 24 Pick. 254.

Virtual acceptance is, *second*, by conduct on the part of the drawee, under such circumstances as to give credit to the bill.

ASSUMPSIT on an order or draft for the sum of \$50, dated New York, April 3, 1834, drawn by Eliza Woolcutt, on the defendant, in favor of the plaintiff.

At the trial in the Court of Common Pleas, before STRONG, J., it was proved by the deposition of W. W. Morse, that the draft was sent to Boston to be collected, while the defendant was absent on a journey to New York; that the witness, who said he was the agent of the plaintiff, informed the defendant in New York, that the draft had been made and sent to Massachusetts, and produced to the defendant a discharge from the draft and requested him to pay it; that the defendant looked at the discharge and replied, that "he would rather pay it in the regular way, when presented," and that "he would meet it at the Concord Bank, or pay to any person who should present it"; that the defendant returned home, and soon afterwards the draft was sent back from Massachusetts; that the plaintiff then gave the draft to the witness with his name indorsed thereon, and requested him to inclose it to the defendant and to ask him to send a fifty-dollar bill by mail; that the witness did so, by a letter dated April 15th, 1834, but received no answer; and that he afterwards wrote to the defendant again and again on the subject without receiving any reply.

By the deposition of Henry Hutchinson it appeared that the de-

ponent received at New York a letter from the defendant, dated May 26, 1834, in which was the following clause: "I received an order from Mr. Morse drawn by Eliza for fifty dollars, which will be disposed of some way or other when I am there."

The judge ruled that this evidence proved a conditional acceptance of the order by the defendant, but that it did not appear from the evidence that the condition had been complied with by the plaintiff; and he instructed the jury that if they believed the witnesses, they must find for the defendant.

The jury returned a verdict for the defendant.

The plaintiff excepted to the instruction, that it did not appear from the testimony that the condition on which the order was accepted, had been complied with.

[Argument not reported.]

PUTNAM, J. Taking it to be true that this was originally a conditional acceptance, and that the condition was not performed, yet there are other facts proved in the case, upon which the jury might have found a verdict for the plaintiff. If the condition were waived and an absolute acceptance were made after the conditional one, it is very clear that the subsequent absolute acceptance should bind the defendant to pay the bill.

The defendant originally refused to accept a discharge of the bill, which was executed by the plaintiff; but said "he would rather pay it in the regular way when presented," and that "he would meet it at the Concord Bank, or pay to any person who should present it." He did not mean to trust to the discharge which was produced; but he meant to take up the draft, to have the draft in his own possession before he paid it.

Well, the plaintiff afterwards sent the draft, indorsed by him, on the 15th of April, 1834, in a letter addressed to the defendant, which the defendant received. Upon the receipt of that letter and draft, the defendant might have insisted, if he had pleased, upon the performance of the strict terms of the condition, viz., that some person should come and present it and give it up, upon payment; or he might consider the sending the draft with a blank indorsement, as a presentation; and having the draft itself so indorsed, he might intend to accept and pay it. If he intended to insist upon the original terms, he was bound to answer the letter of the 15th of April, in a reasonable time, to the end that the plaintiff, the holder of the bill, might take his further remedy, by complying literally with the condition originally proposed. He was requested to send the fifty-dollar bill by the mail, in payment. He might have answered that he would do no such thing, but that if the holder would authorize any person to come to him and receive the money, he would pay it, and in the mean time hold the draft for the use of the holder. But he did not take such a

course. On the contrary, he kept the bill, and the money also, and refused to answer the repeated letters of the agent of the plaintiff upon the subject. He has retained the draft and the money ever since. But on the 26th of May, 1834, he acknowledged by his letter that he had received the order drawn by Eliza (the drawer) for \$50, "which will be disposed of some way or other when I am there." Now he makes no objection as to the want of a due and regular presentation or acceptance of the draft, but, on the contrary, agrees to make *some disposition*, which may fairly mean to pay the same when he should be at New York. Now if there was a waiver of the original condition, and such consent afterwards as amounted to a presentation and acceptance, it renders the acceptor liable; and it is not for him afterwards to postpone the payment, or make any terms when and where he will pay. He became liable to pay as upon an absolute acceptance. Thus, in *Chitty on Bills* (Story's ed. 147), it is stated, that an acceptance may be implied as well as express. It may be implied and inferred from the drawee's keeping the bill a great length of time, or by any other act which gives credit to the bill, and induces the holder not to protest it, and induces him to consider it as accepted. *Clavey v. Dolbin*, Cas. temp. Hardw. 278; *Harvey v. Martin*, 1 Campb. 425.

Now here the holder had no reason to suppose, that the bill was not accepted, as it was retained by the defendant in the manner stated. We all think, that the facts, whether the defendant waived the condition originally made, and whether he did not so conduct himself afterwards, as should by implication bind him as an absolute acceptor of the draft, were proper to be left to the jury. The jury might well infer an absolute acceptance, from the facts disclosed in this report, if not contradicted or explained by other evidence. If there were such an implied acceptance it could not be recalled. *Thornton v. Dick*, 4 Esp. R. 272.

We are all of opinion that the verdict should be set aside and a new trial be had at the bar of this court.

NOTE. — Acceptance by conduct is here classified with acceptance on separate paper and promises to accept, under the term virtual acceptance, because all three stand substantially upon the same footing: the liability of the drawee in any case turns upon the question whether by word or act he has given credit to the bill, and there has been a change of position on the part of the holder in reliance thereon. In this respect they all differ from acceptance proper, which is binding as well in favor of those already parties to the bill, as in favor of those who purchase in reliance on the acceptance. "It is immaterial when an acceptance [proper] is made; it may be made at any time, and the rights of the payee and of indorsees are the same after it is made, whether they were acquired in anticipation of it or subsequent to it." *Arpin v. Owens*, 140 Mass. 144, 145. Cf. N. I. L. §§ 151, 152.

The holder may in any case insist upon acceptance proper, and if this is refused, may treat the bill as dishonored. N. I. L. § 150.

DUNAVAN *v.* FLYNN.

Supreme Court of Massachusetts, October, 1875. 118 Mass. 537.

But mere detention of the bill is not such conduct.¹

CONTRACT to recover \$9 on an account annexed for work and labor. The answer of the defendant contained a general denial and alleged payment. Trial in the Central District Court of Worcester, the judge of which allowed a bill of exceptions in substance as follows:

At the trial, the defendant offered the following order, signed by the plaintiff, drawn on the defendant, and payable to bearer, and dated Worcester, June 27: "Please to pay the bearer 9 dollars due to me for work; this woman is my boarding boss and oblige yours," &c. Below were written the words, "Acted June 30th, 1874," over the defendant's signature. It appeared in evidence, and was not contradicted, that the bearer of the order was Mrs. Cronan; that the order was delivered to her by the plaintiff; that upon the receipt of the order, Mrs. Cronan presented it to the defendant and left the order in the defendant's possession; that the defendant said that he could not pay it then, but that if she could give him three or four days he would pay it; that she gave the defendant the three or four days, and the order was left in the defendant's possession, and there remains, and she never called upon the defendant for payment afterwards. The defendant testified substantially the same, and, upon cross-examination, testified that after the departure of Mrs. Cronan he wrote the words, "Acted June 30th, 1874, J. W. Flynn," upon the face of the order; that he wrote that to make him pay it to Mrs. Cronan; that he intended the words written on the face of the order for an acceptance in writing. On cross-examination, the defendant, in answer to the plaintiff's counsel, said that he did not think his liability to pay the order commenced until after he had written his name on the order.

The judge, against the objection of the defendant, instructed the jury: "If the defendant did not verbally, or in writing, accept the order when presented, but, the order being left with him, he afterwards wrote the acceptance upon it, but did not after such acceptance inform either the drawer or Mrs. Cronan of the fact, but retained the order in his custody, this would not operate as payment of the plaintiff's claim against him."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

In the Superior Court the instructions were affirmed, and the defendant entered the exceptions in this court.

[Argument not reported.]

¹ N. I. L. § 154.

GRAY, C. J. An acceptance of a bill of exchange, or draft for the payment of money, may be oral, or may be implied from acts, such as detention for a long time, contrary to the usage of the parties and under such circumstances as to give credit to the bill.¹ *Storer v. Logan*, 9 Mass. 55, 60; *Pierce v. Kittredge*, 115 Mass. 374; *Hough v. Loring*, 24 Pick. 254, 257; 3 Kent Com. (12th ed.) 85.

But in the case before us, the jury have found that there was no oral acceptance, and were warranted in so doing, for although the testimony of the defendant and of the holder of the bill, tending to prove such acceptance, is stated in the bill of exceptions not to have been contradicted, the jury were not obliged to believe it. Allowing the utmost weight to all the evidence, there was nothing to show that the detention of the bill by the defendant was contrary to the usual course of dealing between the parties (for it did not appear that they had had any other dealings), or that the defendant was under any obligation to return the bill to the holder, or detained it for any other reason except that she did not call for it. Under these circumstances, it was rightly held that the mere writing of the acceptance upon the bill, not communicated to the drawer or holder, and the detention of the bill in the defendant's custody, did not bind him, or operate as a payment of his debt to the drawer. *Clavey v. Dolbin*, Cas. temp. Hardw. 278; *Jeune v. Ward*, 2 Stark. 326; s. c. 1 B. & Ald. 653; *Mason v. Barff*, 2 B. & Ald. 26; *Cox v. Troy*, 5 B. & Ald. 474; s. c. 1 Dowl. & Ryl. 38; *Overman v. Hoboken City Bank*, 1 Vroom, 61, and 2 Vroom, 563.

Exceptions overruled.

JARVIS v. WILSON.

Supreme Court of Connecticut, May, 1878. 46 Conn. 91.

The acceptor admits funds of the drawer in his hands, and agrees to pay the bill according to the tenor of his acceptance.²

ASSUMPSIT by the payee against the acceptor of a bill of exchange. Verdict for the plaintiff, and motion in error by the defendants. The facts are stated in the opinion.

[Argument not reported.]

¹ This, it is believed, is the true theory of acceptance by conduct. *Chitty*, 76, 77; *Hough v. Loring*, 24 Pick. 254, *ante*, p. 107; *Jeune v. Ward*, 2 Stark. 326, 331, opinion of Mr. Justice Bayley. Cf. N. L. L. § 154, providing that if the drawee destroys the bill or refuses within twenty-four hours to return the bill to the holder, he will be deemed to have accepted it. It has been held in New York under a statute, in the words of this section, that to recover, the holder must prove a conversion of the bill. *Mattison v. Moulton*, 11 Hun, 268; s. c. 79 N. Y. 627. It is clear that a mere retention of the bill is not enough, since the holder cannot impose a duty on the drawee to return the bill, apart from custom or agreement; but to require the act to be wrongful, in the sense of a conversion, goes to the other extreme.

² N. L. L. § 79. Cf. *Irving Bank v. Wetherald*, 36 N. Y. 335, *post*, p. 134, as to the effect of certification of a cheque, in mistake as to funds.

LOOMIS, J. On the 8th of July, 1874, one William Murphy owed the plaintiff \$189.20, and drew his order on the defendant in favor of the plaintiff in writing as follows:

"Mr. A. M. Wilson. Please pay Joseph Jarvis one hundred and eighty-nine dollars and twenty cents, and charge the same to me.

WILLIAM MURPHY."

Murphy, who was then and had been for some time in the employ of the defendant, had been authorized by the latter to draw orders in favor of his workmen, of whom the defendant knew the plaintiff to be one.

The above order was duly presented for acceptance to the defendant on the same day that it was given, and the defendant said it was good, and verbally promised to pay it. It afterwards appeared that there was in fact due from the defendant to the drawer only \$144.94, and thereupon the defendant refused to pay the plaintiff as he had before agreed. The court below upon these facts held the defendant liable for the full amount of the order. We think the judgment must stand against all the objections urged in behalf of the defendant.

The defendant claims, *in limine*, that his undertaking cannot be regarded as subject to the rules applicable to bills of exchange, but must be treated as a mere promise to pay money. But we do not see why it does not contain every essential element of the most approved definition of a bill of exchange. It is a written order from Murphy, addressed to the defendant, requesting him to pay the plaintiff a certain sum of money therein named. 1 Bouvier's Law Dict., Bill of Exchange; Byles on Bills, 57; Story on Bills, §§ 3, 37, 40; Edwards on Bills and Notes, 150; Eastern R. R. Co. v. Benedict, 15 Gray, 292; Kendall v. Galvin, 15 Maine, 131; Michigan Ins. Co v. Leavenworth, 30 Verm. 12.

But conceding the order to be a bill of exchange, the defendant further claims that he is not liable, because his acceptance was only by parol, when it should have been in writing.

It is true, as a general rule, that to make one liable as a party to a bill or note his name should appear thereon under his own hand or that of his agent. A wise policy may also require that the liability of an acceptor should not depend on parol evidence, and, recognizing this, some states have already changed the rule of the common law as to an acceptor of a bill of exchange. In New York it is required by statute that the acceptance should be in writing, and there is a similar statute in England as applicable to an inland bill. But where there is no statute to control, the rule is quite general, both in England and in the United States, that an acceptance of a bill of exchange may be by parol. 1 Swift Dig. 424; Story on Bills, §§ 242, 243, 246; 1 Parsons on Cont. 267; Edwards on Bills and Notes,

409; *Dunavan v. Flynn*, 118 Mass. 539; *Spaulding v. Andrews*, 48 Penn. St. R. 411.

The Statute of Frauds does not apply to such an undertaking. One reason may be that the acceptor is regarded as the primary debtor, and his acceptance is an undertaking not merely to pay a debt due from the drawer to the payee, but to pay his own debt to the drawer.

But in this case the defendant relies on the fact that when he accepted the bill he had not in his hands sufficient funds of the drawer to pay the amount required, and contends that the acceptance should therefore either be considered within the statute, or should be held void for want of consideration. This objection ignores the fundamental principle that the acceptance admits everything essential to the validity of the bill, and that want or failure of consideration cannot be shown in a suit by the payee against the acceptor. The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former. The rule of law is not unjust that prevents the acceptor from showing as a defence against a suit by the payee a want of funds of the drawer in his hands, for it was his duty to ascertain before he accepted the bill whether he owed the drawer that amount. This was exclusively within his knowledge, but the plaintiff had no means of knowing how the fact was, and he had a right to assume that the defendant would not accept the bill unless he had funds of the drawer sufficient to make good the acceptance. *Fisher v. Beckwith*, 19 Vt. 31; *Arnold v. Sprague*, 34 Vt. 402; *United States v. Bank of Metropolis*, 15 Pet. 377; *Grant v. Elliott*, 7 Wend. 227; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *Parsons on Notes and Bills*, 323; 1 *Daniel on Negotiable Instruments*, 135.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

PRICE v. NEAL.

King's Bench of England, Michaelmas, 1762. 3 Burr. 1354.

The acceptor further admits, conclusively, that the signature of the drawer is genuine; and this admission is available in favor of any *bona fide* holder.¹

THIS was a special case reserved at sittings before Lord MANSFIELD. It was an action upon the case brought by Price against Neal, wherein Price declares that the defendant Neal was indebted to him in £80 for money had and received to his the plaintiff's use; and dam-

¹ N. I. L. § 79.

ages were laid at £100. The general issue was pleaded, and issue joined thereon.

It was proved at the trial that a bill was drawn as follows: "Leicester, 22 November, 1760. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." Indorsed, "R. Ruding, Antony Topham, Hammond & Laroche. Received the contents, James Watson & Son: Witness Edward Neal;"

That this bill was indorsed to the defendant for a valuable consideration, and notice of the bill left at the plaintiff's house on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40 and take up the said bill, which was done accordingly;

That another bill was drawn as follows: "Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor, as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London;" that this bill was indorsed, "R. Ruding, Thomas Watson & Son. Witness for Smith, Right & Co.;" that the plaintiff accepted this bill by writing on it, "accepted, John Price"; and that the plaintiff wrote on the back of it, "Messieurs Freame & Barclay, pray pay forty pounds for John Price."

That this bill, being so accepted, was indorsed to the defendant for a valuable consideration, and left at his bankers for payment, and was paid by order of the plaintiff and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery. The defendant Neal acted innocently and *bona fide*, without the least privity or suspicion of the said forgeries or of either of them, and paid the whole value of those bills.

The jury found a verdict for the plaintiff, and assessed damages £80 and costs 40s., subject to the opinion of the court upon this question: "Whether the plaintiff, under the circumstances of this case, can recover back from defendant the money he paid on said bills or either of them."

Lord MANSFIELD stopped Mr. Yates for the defendant, saying that this was one of those cases that could never be made plainer by argument.

It is an action upon the case, for money had and received to the plaintiff's use; in which action the plaintiff cannot recover the money unless it be against conscience in the defendant to retain it, and great liberality is always allowed in this sort of action. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of any forgery.

Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then finds out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value, *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff and not in the defendant.

Per Cur. Rule — That the *postea* be delivered to the defendant.

DEDHAM NATIONAL BANK v. EVERETT NATIONAL BANK.

Supreme Court of Massachusetts, January, 1901. 177 Mass. 392; 59 N. E. Rep. 62.

Who has not contributed to the deception of the drawee.

CONTRACT, by a bank to recover money paid to the defendant bank on two forged cheques drawn on the plaintiff. Writ dated October 27, 1898.

The trial in the Superior Court was before BRALEY, J., who reported the case for the consideration of this court.

By the report it appeared that the cheques paid by the plaintiff were both drawn upon the Dedham National Bank of Dedham, were made payable "to the order of cash," and were signed "W. J. Glancy." Beneath each were the words "Payable through Boston Clearing House." The first, dated July 30, 1897, was for \$150, and the second, dated September 2, 1897, was for \$200.

It was in evidence that Glancy had been a depositor in the plaintiff bank about ten years; that Glancy's account was practically a "sleeping deposit"; that he was not in the habit of drawing cheques upon it; that these were the only two cheques purporting to be drawn by him during that year. There was also evidence that country depos-

itors seldom send in their books to be balanced, and that Glancy had not presented his book between July and January.

The two cheques were presented to the defendant bank by one Hitchens, clerk of one Fenno. Fenno was then, and had been for many years, one of the depositors of the defendant. Hitchens represented Fenno at the bank three or four times a week.

At the request of Hitchens, \$50 of the first cheque was paid to him, which he stated was for Fenno, and \$100 was credited to Fenno's account with the bank. On the second cheque, upon a similar request, the defendant paid over its counter to Hitchens the sum of \$100, which the teller supposed was for the benefit of Fenno, and credited the account of H. L. Fenno with the sum of \$100. The defendant's teller testified that during the time Hitchens made deposits for Fenno, cheques were paid in cash in whole or in part for Fenno.

The defendant indorsed both cheques as follows:

"Pay only through Clearing House to the Everett National Bank of Boston.
J. T. EAGER, *Cashier.*"

On August 2 and September 7, 1897, respectively, the two cheques were, through the clearing-house, paid in behalf of the plaintiff by one Arthur M. Daniels, an employee of the plaintiff, and charged by him to Glancy's account. The judge found that the alleged signature, "W. J. Glancy," appearing upon both cheques, was forged by Hitchens. He also found as follows: "At the time when these cheques were cashed, W. J. Glancy's signature was on file with said bank, and I find that if said Arthur M. Daniels had compared the alleged signature of the cheques with the genuine signature of W. J. Glancy he would have discovered the forgery."

On February 25, 1898, the plaintiff wrote to the defendant that the cheques had been discovered to be forgeries and requested repayment.

The judge further found that, at the time Hitchens presented both cheques to the defendant bank, that bank "did not inquire as to the genuineness of the signature of W. J. Glancy, nor require the indorsement of the cheque by the person presenting it for payment, or of the depositor to whose account the cheque was to be credited." He also found as follows: "The evidence was conflicting as to a custom that when a cheque, in the form in which these cheques were drawn, was presented for payment under the circumstances disclosed in this case, it was the duty of the bank to require the identification of the person to whom it was paid, if unknown to the bank, and his indorsement if not a depositor, or the indorsement of the depositor for whose account it was deposited. I am not satisfied that any such custom exists, the usage varying with different banks."

The plaintiff asked the judge to rule:

"1. That if the defendant's conduct led the plaintiff to pay these

cheques, and that they are forgeries, the plaintiff can recover unless there was an unreasonable delay in detecting the forgeries and that the defendant was injured thereby. 2. That on all the evidence the court would not be warranted in finding that the defendant has suffered any loss through any lack of due diligence on the plaintiff's part in discovering the forgeries. 3. If the cheques were forgeries, and the defendant had not paid on account of them, before the plaintiff notified it of the forgeries, more than \$150, the plaintiff can recover the balance paid by it to the defendant on account of them, namely, \$200, in any event. 4. On all the evidence the plaintiff has exercised due diligence in discovering the forgeries. 5. On all the evidence, if the cheques are forgeries, the plaintiff is entitled to recover."

The judge declined to give these rulings, and found and ordered judgment for the defendant.

[Argument not reported.]

HOLMES, C. J. This is an action to recover the amount of two forged cheques on the plaintiff bank paid by it to the defendant. Both cheques were drawn payable to cash, and were without indorsement. Both were presented for deposit to the account of Fenno, a depositor in the defendant bank, by the depositor's clerk, who is found to have been the forger, the first on July 31, the second on September 4, 1897. At the time of depositing the first, which was for \$150, the clerk asked for and received \$50 cash, for Fenno, as he said, and on depositing the second, which was for \$200, he got \$100 in the same way. The residue of the two cheques was credited by the defendant to Fenno on his account. Fenno afterwards overdraw his account, but subsequently made the overdraft good, and his deposit has exceeded the amount of the credit on these cheques since the defendant was notified of the forgery. Both cheques were paid by the plaintiff through the clearing-house, and it is found that, if the plaintiff's servant who paid them had compared the signatures on the cheques with a genuine signature of the supposed maker which it had on file, he would have discovered the forgery. Owing to an examination of Fenno's deposit, the defendant was led to inquire by telephone, shortly after the second cheque was paid, whether the signatures were genuine, and was answered that they were all right. The plaintiff did not demand repayment until February 25, 1898. The judge found and ordered judgment for the defendant. The plaintiff asked rulings in favor of its right to recover either the whole amount, or all but the sums actually paid out to the clerk, and the case is here on exceptions to the refusal to give them.

The plaintiff's argument is directed to proving that we should not adopt the rule laid down in *Price v. Neal*, 3 Burrows, 1354, according to which a drawee paying a forged draft or cheque to a *bona fide*

purchaser cannot recover back the money paid. We are aware that this rule has been questioned by some text writers. But it is of such universal, or nearly universal acceptance that we shall go into no extended discussion. *Gloucester Bank v. Salem Bank*, 17 Mass. 33, 42, 43; *National Bank of North America v. Bangs*, 106 Mass. 441, 444; *Welch v. Goodwin*, 123 Mass. 71, 77; *First National Bank of Danvers v. First National Bank of Salem*, 151 Mass. 280, 283, 24 N. E. 44; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 348; 2 Daniel, Neg. Inst. (3d ed.) §§ 1359-1361.

Probably the rule was adopted from an impression of convenience rather than for any more academic reason; or perhaps we may say that Lord Mansfield took the case out of the doctrine as to payments under a mistake of fact, by the assumption that a holder who simply presents negotiable paper for payment makes no representation as to the signature, and that the drawee pays at his peril. See *Wilkinson v. Johnson*, 3 Barn. & C. 428, 436; *Bernheimer v. Marshall*, 2 Minn. 78, 84; *Bank of St. Albans v. Farmers' & Mechanics' Bank*, 10 Vt. 141, 145, 146; *Ellis v. Trust Co.*, 4 Ohio St. 628, 662.

The ground of a recovery for a payment under a mistake of fact is that the existence of the fact supposed was the conventional basis or tacit condition of the transaction. If parties are so far at arm's length that each takes the risk of what he does, of course one of them cannot recover money paid because he finds that he has made a mistake. We believe that, now at least, especially in the case of a bank, it is a matter of general understanding that, when the holder of a cheque in no way contributes to the deception, the bank does take the risk of paying, so far as the signature is concerned. But if this is so mistake disappears as a ground for recovery, and there is no other. It is vain to point out that in other cases more or less analogous there is an implied representation, e. g., *Railroad Co. v. Richardson*, 135 Mass. 473. The grounds for difference in understanding may be very nice, but, even if the decisions had originated the difference without adequate ground, when once it exists its existence is a sufficient reason for continuing to decide in accordance with it.

The plaintiff attempts to make out that the defendant led the plaintiff to make the payment by requiring no indorsement of the cheques, on the ground that its officer was led by that fact to suppose that they were cashed for the man who appeared to have been their maker. The attempt to prove a custom that would justify such an inference failed, and the judge may not have believed even that the officer was influenced in his conduct by the absence of an indorsement. But if he was, the evidence did not show any duty on the part of the defendant to anticipate such a result.

The indorsement of the cheque by the defendant was not an indorsement by the payee. It was not an indorsement for purposes of transfer, and contained no representations beyond what would have

been imported by a presentment in person. *Bank v. Bangs*, 106 Mass. 441, 444.

In view of the ground on which we put the case, it does not seem to be necessary to consider further objections to the plaintiff's recovery, or to examine more precisely the position of the defendant as a purchaser for value. *Fox v. Bank*, 30 Kan. 441, 1 Pac. 789; *Bank v. Hartshorne*, 3 Abb. Dec. 173.

Judgment affirmed.

NOTE. — Doubtless the true theory of the admission by the acceptor of the drawer's signature, as well as the admission of funds, is that such was the understanding and custom of merchants and bankers. In the case of the *Bank of the United States v. The Bank of Georgia*, 10 Wheat. 333, Mr. Justice Story, in delivering the opinion of the court, said: "The general question, as to the effect of acceptances, has repeatedly come under the consideration of the courts of common law. In the early case of *Wilkinson v. Lutwidge*, 1 Str. 648, the Lord Chief Justice considered that the acceptance of the bill was, in an action against the acceptor, a sufficient proof of the handwriting of the drawer; but it was not conclusive. In the subsequent case of *Jenys v. Fowler*, 2 Str. 946, the Lord Chief Justice would not suffer the acceptor to give the evidence of witnesses, that they did not believe it the drawer's handwriting, from the danger to negotiable notes; and he strongly inclined to think that actual forgery would be no defence, because the acceptance had given the bill a credit to the indorsee. Subsequent to this was the case of *Price v. Neal*, 3 Burr. 1355, already commented on, in which it was thought the acceptor ought to be conclusively bound by his acceptance. The correctness of this doctrine was recognized by Mr. Justice Buller, in *Smith v. Chester*, 1 D. & E. 655, by Lord Kenyon, in *Barber v. Gingell*, 3 Esq. 60, where he extended it to an implied acceptance; and by Mr. Justice Dampier, in *Bass v. Clive*, 4 M. & Selw. 15, and it was acted upon by necessary implication by the court, in *Smith v. Mercer*, 6 Taunt. 76. In *Levy v. The Bank of the United States*, 1 Binn. 27, already referred to, where a forged cheque, drawn upon the bank, had been accepted by the latter, and carried to the credit of the plaintiff, and on the refusal of the bank afterwards to pay the amount the suit was brought, the court expressly held the plaintiff entitled to recover, upon the ground that the acceptance concluded the defendant. The case was very strong, for the fraud was discovered a few hours only after the receipt of the cheque, and immediate notice given. But this was not thought in the slightest degree to vary the legal result. 'Some of the cases,' said the court, 'decide that the acceptor is bound, because the acceptance gives a credit to the bill, etc. But the modern cases certainly notice another reason for his liability, which we think has much good sense in it, namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself.' After some research, we have not been able to find a single case, in which the general doctrine, thus asserted, has been shaken, or even doubted; and the diligence of the counsel for the defendants on the present occasion, has not been more successful than our own." In that case the defendant was sued to recover the value of certain bank-notes issued by it, which, after issue had been fraudulently altered, and had then been accepted by the defendant bank and placed to the credit of the plaintiff; on discovery of the forgery, the defendant tendered the notes to the plaintiff

bank," which refused to receive them. The court held that the case was within the principle quoted *supra*, and that, *a fortiori*, the defendant was bound to know its own notes.

The same principle was recognized and affirmed by the Supreme Court of Vermont in *Bank of St. Albans v. Mechanics' Bank*, 10 Vt. 141; and by the Supreme Court of New York in *Goddard v. The Merchants' Bank*, 4 N. Y. (Comst.) 147, in which case Mr. Justice Ruggles said, "The rule . . . should not be departed from or frittered away by exceptions resting on slight grounds." See *Bigelow, Bills and Notes*, 223, 224; *Chitty on Bills*, 206.

The last two cases cited *supra* were cases of cheques to which the principle is equally applicable.

There is, however, a tendency in the modern decisions toward a modification of the rule, and the acceptance (or certification) has been treated as a recommendation of the instrument or as a representation of its genuineness; accordingly, it has even been held that if the holder has taken a bill before acceptance, the acceptor will not be precluded from setting up as a defence, the forgery of the drawer's signature, nor, if he has paid the bill, from recovering back the money. *McKelroy v. Southern Bank of Kentucky*, 14 La. An. 458. So, too, it has been held that, if the holder has indorsed the instrument for the purpose of passing title, the drawee in accepting or paying, does not admit that the signature of the drawer is genuine, on the ground that, by indorsing, the holder has warranted the genuineness of signatures then on the instrument. *National Bank of North America v. Banga*, 106 Mass. 441.

In many of the cases, the question has arisen in a suit by the drawee to recover back money paid on the instrument, as paid under a mistake of fact. The action is that for money had and received, which is of the nature of a suit in equity; such was the case of *Price v. Neal*, *supra*. Possibly this fact explains some of the modifications of the rule of the law merchant.

In *Ellis v. Ohio Ins. Co.*, 4 Ohio St. 628, 651, it was said by Mr. Justice Ranney: "There is, certainly, no room for the application of technical or arbitrary rules, in determining the rights of the parties. Neither the form of the action nor the nature of the subject permits it. The action is brought for money had and received; and it lies in all cases, where one has the money of another, which he cannot in equity and good conscience retain. It lies, therefore, for money paid by mistake, or upon a consideration which has failed; because, in such case, the plaintiff did not intend to give his money to the defendant, and the latter cannot conscientiously retain money for which he has given no equivalent. This is the general rule; but it has its exceptions, as well settled and resting upon reasons as solid and satisfactory as the rule itself. Wherever the mistake has arisen from the fault or negligence of the party paying the money, and cannot be corrected without prejudice to the party who has received it, there can be no recovery, and simply because the plaintiff is alone in fault; the defendant is under no obligation to submit to loss, to extricate him from difficulty, and may therefore conscientiously retain the money." And if the defendant has misled the drawee, or has been negligent, then, it is said, he cannot retain the money.

In point of theory, at least, it seems that, whether the action is upon the instrument to recover from the acceptor, or is at common law to recover back money paid, the same reason ought to apply, and unless mercantile custom has fixed some modification, the courts ought not to create any out of the nature of the action, by which it is attempted to enforce a supposed right. And custom may well have established a modification of the rule; it is doubtless

according to custom that the admission is only in favor of a *bona fide* holder. So, too, custom may impose upon the holder the burden of knowledge of the drawer's signature. In *Ellis v. Ohio Ins. Co.*, *supra*, a cheque drawn on the plaintiffs was presented to the defendant for discount by a stranger; the defendant discounted the cheque, without inquiry, and then presented it to the plaintiffs, who paid it. The signature of the drawer of the cheque was a forgery, and upon discovering this fact the plaintiffs demanded back the money. The defendant refused to refund the money, and this action was brought. In giving judgment for the plaintiffs, the court said that there was evidence clearly tending to prove that there existed "a general custom among the banks of Cincinnati, requiring the bank taking a cheque of this character, drawn upon another, from a stranger, to be satisfied, by inquiry, of his right to the cheque, and of the person from whom it was received; and as clearly allowing the bank upon which it was drawn, to rely upon the presumption that such caution had been exercised, when the cheque was presented for payment." But cf. *Commercial and Farmers' National Bank v. First National Bank*, 80 Md. 11. See *Bigelow, Bills and Notes*, 225.

The point is, that payment should stand on the same footing as acceptance or certification. "The payment, of course, involves an acceptance," and, further, that any one of these acts is more than a recommendation or representation: it is, in fact, an admission to all *bona fide* holders that the instrument is the genuine bill or cheque of the drawer of it, and whether the holder took before acceptance is immaterial. In *Price v. Neal*, one bill was taken before and one after acceptance, but Lord Mansfield considered the holder's rights to be the same in both instances. See also language in *Bank of the United States v. Bank of Georgia*, *supra*, and in *Arpin v. Owens*, 140 Mass. 144, *ante*, p. 109, note.

In *Bernheimer v. Marshall*, 2 Minn. 61, it was held that the drawee, having paid a forged draft upon him, could not recover from the holder, although the latter had said, in demanding payment, that he held the draft of X, the supposed drawer. The court said, "Every man in presenting a draft for payment says, in substance, either expressly or by implication, 'here is the draft of A B, which I wish you to pay.' Such a statement in the ordinary course of business would not be understood as a warrantee of the genuineness of the draft." Nor should indorsement, it seems, be considered as such a warranty to the drawee. It is true that an indorser vouches for the genuineness of signatures upon the instrument which he negotiates; but this warranty or admission is to subsequent holders, and not to the drawee.

BANK OF COMMERCE v. UNION BANK.

Court of Appeals of New York, April, 1850. 3 Comst. 280.

But the acceptor does not admit that the body of the bill is genuine.

ASSUMPSIT by the drawee of a bill of exchange against the late holder to recover the amount thereof paid to him, as paid under mistake of fact. The bill as originally drawn was a request to the plaintiff to pay "one hundred and five dollars to the order of J. Durand." After it was delivered the word "hundred" was fraudulently altered

to "thousand," and the name "Durand" to "Bonnet." J. Bonnet now indorsed it for value and without notice to the State Bank of Charleston, which sent it for collection to the defendant; to which the plaintiff paid it at sight, in ignorance of the alterations. The alterations having afterwards come to light, the plaintiff demanded of the defendant the return of the money, which was refused.

The court below charged the jury that on such facts the plaintiff would be entitled to recover. The defendant excepted. Judgment for the plaintiff; appeal by the defendant.

[Argument reported.]

RUGGLES, J. The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer's signature, which he is not afterwards, in a controversy between himself and the holder, at liberty to dispute; and therefore if the drawer's signature is on a subsequent day discovered to be a forgery, the drawee cannot compel the holder to whom he paid the bill to restore the money unless the holder be in some way implicated in the fraud. *Price v. Neal*, 3 Burr. 1354.¹ This rule is founded on the supposed negligence of the drawee in failing, by an examination of the signature when the bill is presented, to detect the forgery and refuse payment.²

The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer, from his imputed negligence, must bear the loss. In *Price v. Neal* the plaintiff had paid to Neal, the holder, two bills of exchange purporting to be drawn on him by Sutton, whose name was forged. On discovery of the forgery Price brought his action against Neal to recover back the money as paid by mistake. Lord Mansfield, in delivering the opinion of the court in favor of the defendant, said "it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it, but it was not incumbent upon the defendant to inquire into it." "Whatever neglect there was, was on his side. It is a misfortune which has happened without the defendant's fault or neglect."

But it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill. There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans.

¹ *Ante*, p. 113.

² *Quare*, see p. 119, note.

The signature was in the name and handwriting of the cashier. The signature is genuine.¹ The forgery was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face. Whether it was so or not in this case was properly submitted to the jury, who found that it was paid by mistake and without knowledge of or reason to suspect the fraudulent alterations. It would have been difficult to find otherwise upon the evidence, the bill having passed through the defendants' bank and the Charleston Bank without suspicion. If the forgery had been in the name of the drawer, it might not perhaps have been incumbent on those banks to scrutinize the bill, because they might have relied on the drawer's better knowledge of the hand; but the forgery being in the body of the bill, the plaintiffs were not more in fault than the defendants.

The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill, each indorser receives it on the credit of the previous indorsers; and it was the interest and duty, in the present case, of the Bank of Charleston to satisfy itself that the bill was genuine, or that its immediate indorser was able to respond in case the bill should prove to be spurious. The party who fraudulently passed the bill cannot avoid his liability to refund on the pretence of delay in detecting the forgery or in giving notice of it; and if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require. *Canal Bank v. The Bank of Albany*, 1 Hill, 287, 292, 293.

In *Smith v. Mercer*, 6 Taunt. 76, in *Cocks v. Masterman*, 9 Barn. & C. 902, and in *Price v. Neal*, 3 Burr. 1354, the plaintiffs who paid the forged bills, being chargeable with a knowledge of the signature of the drawer (which was forged), were held to have paid it negligently and without due caution and examination, and on that ground it was that the defendants to whom they paid the money were held not liable without immediate notice of the forgery. But in the present case no such negligence is imputable to the plaintiffs, the plaintiffs being no more capable of detecting the forged alteration by inspection of the bill than either of the other parties.

¹ Cf. *National Park Bank v. Ninth National Bank*, 46 N. Y. 77.

This action is not founded on the bill as an instrument containing the contract on which the suit is brought. The acceptor can never have recourse on the bill against the indorsers. But the plaintiff's right of recovery rests on equitable grounds.¹ In the *Canal Bank v. The Bank of Albany* the principle was recognized, that money paid by one party to another through mutual mistake of facts in respect to which both were equally bound to inquire, may be recovered back. The defendants here, as in that case, have obtained the money of the plaintiff without right and on the exhibition of a forged title as genuine, the forgery being unknown to both parties. The defendants ought not in conscience to retain the money, because it does not belong to them; and for the further reason that the defendants and the previous indorsers have each, on the same principle, their remedy over against the party to whom they respectively paid the money, until the wrong-doer is finally made to pay. If that party should be irresponsible, or if he cannot be found, the loss ought to fall on the party who, without due caution, took the bill from him.

In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill is excused, provided notice of the forgery be given as soon as it is discovered.²

Judgment affirmed.

¹ See note, *ante*, pp. 119 *et seq.*

² But cf. *London Bank v. Bank of Liverpool*, 1896, 1 Q. B. 7, Mathews, J., of cases in which there are parties entitled to notice of dishonor. Also *Imperial Bank v. Bank of Hamilton*, 1903, A. C. 49; and *post*, p. 148.

CHAPTER VI.

CERTIFIER'S CONTRACT.

CARR v. NATIONAL SECURITY BANK.

Supreme Court of Massachusetts, March, 1871. 107 Mass. 45.

A bank is not liable to the holder of a cheque, drawn upon it, unless it has certified the cheque.¹

CONTRACT by the payee against the drawees, on a bank cheque. The declaration alleged that the defendants were a banking corporation of deposit, discount, and circulation, doing business in Boston, and the firm of Lincoln & Co. on and before May, 1868, "were customers of and depositors in said bank, and had been accustomed to deposit money in said bank, and draw their cheques upon the same, and said bank, in consideration that said firm would so deposit funds in said bank, promised and agreed with said firm to pay all cheques and drafts of said firm on said bank, when in funds of said firm to pay the same, and said bank had for a long time previous to May, 1868, so paid said drafts and cheques of said firm;" that Lincoln & Co. on May 2, 1868, in consideration of \$600 paid to them by the plaintiff, drew their cheque upon the defendants for the sum of \$600 payable to the plaintiff's order, and the plaintiff duly presented it to the defendants at their place of business, and demanded payment of it; that "at the time of the presentment and demand the defendants were indebted to said firm, and said firm had funds in the bank, against and upon which they were entitled to draw the cheque, to a greater amount than \$600"; but that the defendants refused to pay the cheque, and have never paid it or any part of it; and that the plaintiff continues to be the holder of the cheque, and no part of it has ever been paid to him, and he has never been able to collect it, or any part of it, from Lincoln & Co. A copy of the cheque was annexed.

The defendants demurred, on the ground that no legal cause of action was stated, because the declaration did not set forth any agreement, express or implied, of the defendants with the plaintiff, to pay the cheque. The Superior Court sustained the demurrer, and ordered judgment for the defendants; and the plaintiff appealed.

[Argument reported.]

¹ N. I. L. § 206.

GRAY, J. It is a general rule of law, that upon a promise made by one person to another, for the benefit of a third from whom no consideration moves, the latter cannot sue; and the exception to this rule, which holds a person, in whose hands funds have been placed to pay creditors of the depositor, liable to actions by them, has not been extended, in this Commonwealth or in England, to a case in which neither such creditors nor the amounts of their debts are named or ascertained at the date of the promise. *Mellen v. Whipple*, 1 Gray, 317; *Dow v. Clark*, 7 Gray, 198; *Frost v. Gage*, 1 Allen, 262; *Fairlie v. Denton*, 8 B. & C. 395; s. c. 2 Man. & Ryl. 353; *Gerhard v. Bates*, 2 El. & Bl. 476. And by our law a promise to the drawer by the drawee of a negotiable draft or bill of exchange to accept and pay the same does not make the drawee liable to an action by a holder, unless he has taken the draft on the faith of such promise; but is a mere *chose in action*, upon which he only to whom it was made can sue. *Exchange Bank v. Rice*, 98 Mass. 288, and 107 Mass. 37.¹ In the cases, mentioned at the argument, of general letters of credit and public offers of reward, the person who, by making an advance in the one case, or doing the acts specified in the offer in the other, accepts the proposition of the defendant, becomes himself the other party to the contract, and the one from whom the consideration moves.

The plaintiff in the present case does not allege that the defendants made any promise to him, or that he did anything upon the faith of their promise to the drawer, or even knew of that promise when he took the cheque sued on. The relation between the defendants and the drawer, as disclosed in the declaration, was simply the ordinary one of bankers and customer, which is a relation of debtor and creditor, not of agent and principal, or trustee and *cestui que trust*. The bankers agree with their customer to receive his deposits, to account with him for them, to repay them to him on demand, and to honor his cheques to the amount for which they are accountable to him when the cheques are presented; and for any breach of that agreement they are liable to an action by him. But the money deposited becomes the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to the depositor to pay an equivalent sum upon his demand or order. The right of the bankers to use the money for their own benefit is the very consideration for their promise to the depositor. They make no agreement with the holders of his cheques. A cheque drawn by him in common form, not designating any special fund out of which it is to be paid, nor corresponding to the whole amount due to him from the bankers at the time, is a mere contract between the drawer and the payee, on which,

¹ s. c. 107 Mass. 37, *ante*, p. 95.

if payable to bearer, and not paid by the drawees, any holder might doubtless sue the drawer (as suggested in *Ancona v. Marks*, 7 H. & N. 686, 696, cited for the plaintiff), but which passes no title, legal or equitable, to the payee or holder, in the moneys previously paid to the bankers by the drawer; and the bankers' promise to the drawer to honor his cheques does not render them, while still liable to account with him for the amount of any cheque as part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter, by accepting the cheque when presented, or otherwise. The view, thus briefly stated, is in accordance with the law as established in England,¹ in New York, and in Pennsylvania, with the opinions heretofore expressed by this court, and with the recent unanimous decision of the Supreme Court of the United States. *Foley v. Hill*, 1 Phil. Ch. 399, and 2 H. L. Cas. 28; *Parke, B.*, in *Bellamy v. Marjoribanks*, 7 Exch. 389, 404; *Addison on Con.* (6th ed.) 810; *Chapman v. White*, 2 Selden, 412, 417; *Loyd v. McCaffrey*, 46 Penn. St. 410, 414; *Bullard v. Randall*, 1 Gray, 605; *Dana v. Third National Bank*, 13 Allen, 445; *Bank of the Republic v. Millard*, 10 Wallace, 152.

Judgment for the defendants affirmed.

NOTE. — In some States it is held that if the drawer of a cheque has on deposit sufficient funds to meet it, the bank is liable to an action by the holder, if it refuses to pay the cheque on demand. In *Munn v. Burch*, 25 Ill. 21, 26, it was said: "We hold, then, that the cheque of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the cheque calls for, which may again be transferred to another by delivery, and when presented to the banker he becomes the holder of the money to the use of the owner of the cheque, and is bound to account to him for that amount, provided the party drawing the cheque has funds to that amount on deposit, subject to his cheque at the time it is presented." In *Gage Hotel Co. v. Union National Bank*, 171 Ill. 531, 49 N. E. Rep. 420, it was held that the holder of a cheque could maintain an action against the drawee bank, upon refusal to pay the cheque, although the drawer had countermanded payment before the cheque was presented, sufficient funds being on deposit with which to pay; the ground of the decision was that there is a contract, implied in law, on the part of the bank to pay the holder upon presentment of the cheque. It was said, quoting the language of the court in *Munn v. Burch*, *supra*, that there is "a privity of contract between the banker and the holder of the cheque, created by the implied promise held out to the world by the banker on the one side, and the receiving of the cheque for value, and presenting it on the other." See also *Roberts v. Austin*, 26 Iowa, 324; *Dillman v. Carlin*, 105 Wis. 14, 80 N. W. Rep. 932; *Simmons Hardware Co. v. Greenwood Bank*, 41 So. Ca. 177, 19 S. C. Rep. 502; *Covert v. Rhodes*, 43 Ohio St. 66.

The Supreme Court of the United States, however, has laid down the rule as in the principal case. In *Bank of The Republic v. Millard*, 10 Wall. 152,

¹ Bills of Exchange Act, §§ 53 (1), 73, 74 (3).

Millard sued the bank to recover the amount of a cheque drawn upon it to his order. The defendant bank asked the court to charge "that unless the jury were satisfied from the evidence that it accepted the cheque in favor of the plaintiff, . . . he was not entitled to recover." The court refused to give this instruction, and the jury found a verdict for Millard.

In reversing the judgment of the lower court, the Supreme Court said, per Mr. Justice Davis, "It is important . . . that there should be no mistake about the status, which the holder of a cheque sustains toward the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused; but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring *assumpsit* for the breach of the contract to honor his cheques; and if the holder has a similar right, then the anomaly is presented of a right of action on one promise, for the same thing, existing in two distinct persons at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the cheque on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction."

WILEY v. BUNKER HILL NATIONAL BANK.

Supreme Court of Massachusetts, June, 1903. 183 Mass. 495; 67 N. E. Rep. 655.

But it is liable to a depositor for refusal to honor his cheques, in contract or tort.

CONTRACT and tort, by a trader engaged in the business of buying and selling coal and wood in that part of Boston called Charlestown, against a bank for refusing to pay certain cheques of the plaintiff, thereby injuring his credit. Writ dated February 25, 1898.

At the trial in the Superior Court before RICHARDSON, J., the jury returned a verdict for the plaintiff in the sum of \$25,000, of which he was required by the judge to remit all in excess of \$10,000. The defendant alleged exceptions.

[Argument not reported.]

MORTON, J. This is an action to recover damages for the refusal by the defendant to honor certain cheques drawn on it by the plaintiff against a deposit subject to cheque which he had with the defendant, and which was more than sufficient to meet the cheque so drawn when presented. The action is described in the writ as in contract and tort, it being doubtful to which class it belongs. The declaration contains eight counts. The eighth count was waived at the trial and the case proceeded on the remaining counts, each count representing a different cheque. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the

refusal of the presiding judge to give certain rulings asked for by it, and to the giving by him of certain rulings requested by the plaintiff. There is also an appeal by the defendant from the overruling of a demurrer to the declaration. This has not been argued and we therefore treat it as waived.

A bank is bound to honor cheques drawn on it by a depositor if it has sufficient funds belonging to the depositor when the cheque is presented and the funds are not subject to any lien or claim, and for its refusal or neglect to do so it is liable to an action by the depositor. *National Mahaiwe Bank v. Peck*, 127 Mass. 298; *Carr v. National Security Bank*, 107 Mass. 45, 48; *Dana v. Third National Bank*, 13 Allen, 445, 448; *Marzetti v. Williams*, 1 B. & A. 415; *Rolin v. Steward*, 14 C. B. 595; *American National Bank v. Morey*, 69 S. W. Rep. 759; *Hopkinson v. Forster*, L. R. 19 Eq. 74; 2 *Parsons, Notes and Bills*, 62, 63; 2 *Dan. Neg. Instr.* § 1642; 5 *Am. and Eng. Encyc. of Law* (2d ed.), 1059, 1060.

The cause of action, though sometimes spoken of as in the nature of a tort, arises out of a breach of the contract implied from the relation of the parties, that the banker will honor the cheques of the depositor, and the party aggrieved may recover, as in other cases of a breach of contract, for the damages that are the natural and reasonable consequences of the breach. Special damages may also be recovered if they are properly alleged. *Marzetti v. Williams*, *Rolin v. Steward*, and *Hopkinson v. Forster*, *ubi supra*; *Prehn v. Royal Bank of Liverpool*, L. R. 5 Ex. 92; *Larios v. Bonany y Gurety*, L. R. 5 P. C. 346; *Fleming v. Bank of New Zealand* (1900), A. C. 577; *Patterson v. Marine National Bank*, 130 Penn. St. 419, 433; *Schaffner v. Ehrman*, 139 Ill. 109; *James v. Continental National Bank*, 105 Tenn. 1; *Svendsen v. State Bank of Duluth*, 64 Minn. 40; *American National Bank v. Morey*, 69 S. W. Rep. 759; *Robey v. Oriental Bank*, 2 New South Wales, N. S. 56, 63.

In the case of a trader injury to his credit may be inferred from the fact that he is a trader, and substantial damages may be found and given upon proof of that fact without anything more. In the case of a person who is not a trader, if no special damages are alleged and proved, nominal damages at least may be recovered. In the present case the declaration alleges that the plaintiff was and had been a trader engaged in the business of buying and selling coal and wood in Charlestown, and there was evidence tending to show that his business amounted to \$150,000 yearly. It was competent, therefore, for the jury to find and award substantial damages, and the ruling requested that the plaintiff could recover only nominal damages was rightly refused, unless the rulings requested in regard to set-off should have been given. For reasons already given the first request was also rightly refused, as was also that part of the second which sought to limit the defendant's liability to the amount of the

plaintiff's funds in its hands or to the amount of the cheque or cheques that were refused payment. The rest of the second request was given.

The remaining question relates to the right in equity of the defendant to set off by reason of the plaintiff's insolvency against the deposit two unmatured notes made by the plaintiff and discounted and held by the defendant. This is an action at law and the defendant concedes that there is no right of set-off at law. But it contends that the plaintiff being in fact insolvent at the time when the cheques in question were drawn and presented, it had the right in equity to refuse payment and to apply the deposit to the notes held by it against the plaintiff, notwithstanding they had not matured. No question is made as to the defendant's right to deduct the demand notes from the plaintiff's deposit; but the plaintiff contends that neither in equity nor at law had the defendant the right to set off the notes that were not due. It is to be observed that the answer does not in terms at least aver that the defendant had a right to an equitable set-off, and acted thereunder, though it alleges that the plaintiff was in fact insolvent prior to the presentment of the cheques. But this objection has not been taken. At the time when the defendant refused to pay or honor the cheque in question no proceedings had been instituted by or against the plaintiff to have him adjudged insolvent. He had not made the common-law assignment which he subsequently made. For aught that appears he was in good standing and credit and could have gone on indefinitely as he had been going on unless confronted with unfavorable conditions. The defendant required him to make a statement of his assets and liabilities, which he did, and thereupon, it appearing that his liabilities exceeded his assets, the defendant decided that he was insolvent, and refused to honor cheques which he had previously given, and claimed the right to set off the unmatured notes against the deposit. If proceedings in insolvency or bankruptcy had been instituted by or against the plaintiff at or before the presentment of the cheques, or even if the plaintiff had made an assignment at common law for the benefit of his creditors, the case would no doubt have stood differently. The defendant has cited many cases, including several from the Supreme Court of the United States, in which it contends that the doctrine of equitable set-off has been applied in favor of banks and others under circumstances similar to those in this case. The last case cited from the United States Supreme Court is *Scott v. Armstrong*, 146 U. S. 499. It was there laid down that where mutual credits and obligations have grown out of and are connected with the same transaction, insolvency on the one hand will justify setting off, in equity, the debt due upon the other. The Chief Justice said in the course of the opinion, "In the case at bar the credits between the banks were reciprocal and were parts of the same transaction, in which each gave

credit to the other on the faith of the simultaneous credit, and the principle applicable to mutual credits applied," and it was held that, under the circumstances there shown, there was a right of set-off in equity. The case would hardly seem to warrant the broad rule contended for by the defendant. But without undertaking to review all the cases cited by the defendant, and conceding, as the defendant contends, that the right of equitable set-off exists independently of statute, and of insolvency or bankruptcy, we think that the present case is concluded by *Spaulding v. Backus*, 122 Mass. 553. In that case the court said, "Whatever may be the rights of a party whose debt is due and payable, to compel an insolvent debtor to set off a claim against him not due, — which question we are not called upon here to decide, — we are clearly of opinion that a party, whose debt is not due, has no equitable claim to have it set off against a debt of his own, already due, in the hands of a party who is insolvent." It seems to us that this is decisive of the case before us. See also *In re Commercial Bank Corporation of India*, L. R. 1 Ch. 538.

It is to be observed that the jury returned a verdict for the plaintiff, and they must be taken to have found that he was solvent, according to the usual meaning of that term (*Thompson v. Thompson*, 4 Cush. 127; *Lee v. Kilburn*, 3 Gray, 594; *Peabody v. Knapp*, 153 Mass. 242), at the time when his cheques were dishonored.

Exceptions overruled.

MINOT v. RUSS.

Supreme Court of Massachusetts, June, 1892. 156 Mass. 458.

The drawer is discharged if the holder takes the certification of the bank, rather than payment;¹ but not if the drawer in his own behalf gets the cheque certified.

THE case is stated in the opinion of the court.

[Argument not reported.]

FIELD, C. J. The first case is an appeal from a judgment rendered by the Superior Court for the defendant, on his demurrer to the declaration. The defendant, on October 29, 1891, drew a cheque on the Maverick National Bank, payable to the order of the plaintiff, and, being informed by the plaintiff that the cheque must be certified by the bank before it would be received, the defendant on the same day presented the cheque to the bank for certification, and the bank certified it by writing on the face of the cheque the following: "Maverick National Bank. Pay only through Clearing-House. J. W. Work, Cashier. A. C. J., Paying Teller." After it was certified, the

¹ N. I. L. § 205.

cheque was, on Saturday, October 31, 1891, delivered by the defendant to the plaintiffs, for a valuable consideration. The declaration alleges that the bank stopped payment on Monday morning, November 2, 1891, "before the commencement of business hours on said day," and that on that day payment was duly demanded of the bank, and notice of non-payment was duly given to the defendant.

The second case is an appeal from a judgment rendered for the defendants by the Superior Court, on an agreed statement of facts. On Saturday, October 31, 1891, the defendants drew their cheque on the Maverick National Bank, payable to the order of the plaintiffs, and delivered it to them in payment of stocks bought by the defendants of the plaintiffs. The cheque was received too late to be deposited by the plaintiffs for collection in season to be carried to the clearing-house on that day, but during banking hours on that day the plaintiffs presented the cheque to the Maverick National Bank for certification, and the bank certified it by writing or stamping on its face the following: "Maverick National Bank. Certified. Pay only through Clearing-House. C. C. Domett, A. Cashier. —, Paying Teller."

At that time the defendants had on deposit sufficient funds to pay the cheque, and the bank on certification charged to the defendants' account the amount of the cheque, and credited it to a ledger account called certified cheques, in accordance with their uniform custom. After certification, the plaintiffs, on the same day, deposited the cheque in the Hamilton National Bank for collection. It is agreed that if the cheque had been presented for payment on Saturday, in banking hours, it would have been paid; but the Maverick National Bank transacted no business after Saturday, and on Sunday the Comptroller of the Currency placed a national bank examiner in charge, and the bank was put into the hands of a receiver. The clearing-house on November 2 refused to receive cheques on the Maverick National Bank, and the cheque was on that day duly presented for payment, and due notice of non-payment was given to the defendants.

Each of the cheques was in the ordinary form of cheques on a bank, and was payable on demand, and no presentment for acceptance or certification was necessary. In a sense, undoubtedly, a cheque is a species of bill of exchange, and in a sense also it is a distinct commercial instrument; but according to the general understanding of merchants, and according to our statutes, these instruments were cheques, and not bills of exchange. "A cheque is an order to pay the holder a sum of money at the bank, on presentment of the cheque and demand of the money; no previous notice is necessary, no acceptance is required or expected, it has no days of grace. It is payable on presentment and not before." *Bullard v. Randall*, 1 Gray, 605, 606. The duty of the bank was to pay these cheques when they were

presented for payment, if the drawers had sufficient funds on deposit. The bank owed no duty to the drawers to certify the cheques, although it could certify them if it saw fit, at the request of either the drawers or the holders, and if it certified them it became bound directly to the holders, or to the persons who should become the holders. In either case, the bank would charge to the account of the drawer the amount of the cheque, because by certification it had become absolutely liable to pay the cheque when presented. When a cheque payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But when the payee or holder of a cheque presents it for certification, the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the cheque instead of paying it. In one case the bank certifies the cheque for the use or convenience of the drawer, and in the other for the use or convenience of the holder. In the present cases the cheques were seasonably presented to the bank for payment, and on the facts stated the defendants would be liable unless the certification discharged them from liability.

It is argued that the certification of a cheque, whereby the bank becomes absolutely liable to pay it at any time on demand, discharges the drawer, because it is said that the cheque then becomes in effect a certificate of deposit; and it is also argued that the certification is in effect only an acceptance of a bill of exchange, and that if payment is duly demanded of the bank and refused, and notice of non-payment duly given, the drawer is held.¹ So far as the question has been considered, it has been decided that the certification of a bank cheque is not, in all respects, like the making of a certificate of deposit, or the acceptance of a bill of exchange, but that it is a thing *sui generis*, and that the effect of it depends upon the person who, in his own behalf, or for his own benefit, induces the bank to certify the cheque. The weight of authority is, that if the drawer in his own behalf, or for his own benefit, gets his cheque certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged. *Born v. First National Bank*, 123 Ind. 78; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Andrews v. German National Bank*, 9 Heisk. 211; *First National Bank v. Leach*, 52 N. Y. 350; *Boyd v.*

¹ It was so held in *Bickford v. National Bank*, 42 Ill. 238, by analogy to the bill of exchange. But the analogy is not perfect; the drawer of the cheque does not order certification; his order is to pay money.

Nasmith, 17 Ont. 40; *Essex County National Bank v. Bank of Montreal*, 7 Biss. 193; *First National Bank v. Whitman*, 94 U. S. 343, 345; *Metropolitan National Bank v. Jones*, 27 N. E. Rep. 533; *Continental National Bank v. Cornhauser*, 37 Ill. App. 475; *National Commercial Bank v. Miller*, 77 Ala. 168; *Larsen v. Breene*, 12 Col. 480; *Mutual National Bank v. Rotge*, 28 La. An. 933; *Morse on Banking*, §§ 414, 415. We are of opinion that this view of the law rests on sound reasons. If it be true that the existing methods of doing business make the use of certified cheques necessary, the persons who receive them can always require them to be certified before delivery. If they receive them uncertified and then present them to the bank for certification instead of payment, the certification should be considered as discharging the drawer.

It may also be said, that in the second case the certification amounted to an extension of the time of payment at the request of the payees, without the consent of the drawers. Before the certification the drawers could have requested the payees to present the cheque for payment on Saturday, or could themselves have drawn out the money and paid the cheque. After certification the amount of the cheque no longer stood to the credit of the drawers, and the payees had accepted an obligation of the bank to pay only through the clearing-house, which could not happen before the following Monday. The result is that in the first case the judgment is reversed, and the demurrer overruled, and in the second case the judgment is affirmed.

THE IRVING BANK *v.* WETHERALD.

Supreme Court of New York, March, 1867. 36 N. Y. 335.

The certifier does not conclusively admit funds of the drawer, and if certification has been made in mistake of funds, it may be withdrawn, provided the holder will suffer no prejudice thereby; notes payable at bank may be certified.

ACTION by the holder against the indorsers of a negotiable promissory note. One Wilson made the note, payable to himself at the Irving Bank, and indorsed it to the defendants, Wetherald and Young, who indorsed it to the Seventh Ward Bank. At maturity, the note was presented to the plaintiff bank by the Seventh Ward Bank, and the plaintiff certified it, by its teller, and the Seventh Ward Bank marked it "paid."

Later on the same day the plaintiff bank discovered that Wilson had no funds on deposit, and immediately notified the Seventh Ward Bank, requesting that the certification might be withdrawn. This the Seventh Bank refused, and the plaintiff, having paid the Seventh Ward Bank the full amount of the note, on the same day, presented

it at the counter of the Irving Bank, protested it for non-payment, and gave notice of dishonor to the defendants.

Judgment was given for the defendants, which was reversed at the General Term, and the defendants appealed, agreeing that if the reversal was affirmed, judgment absolute might be entered against them.

[Argument not reported.]

HUNT, J. Both the judge at the circuit, and the General Term were of the opinion, that the notice by the plaintiffs to the Seventh Ward Bank, of the mistake in certifying Wilson's cheque¹ to be good, before any steps had been taken, or any measures omitted by the Seventh Ward Bank, and while there was still time to fix all the parties upon the note, relieved the plaintiffs from their liability on the certificate. In this opinion I concur. Such a certificate possesses no extraordinary or hidden power. It should impose no greater liability than its terms fairly require. Divested of all technical terms, the transaction in question was simply this: The Seventh Ward Bank present for payment at the Irving Bank, where it is made payable, the note of Morris Wilson. The making the note payable there was a warrant from the maker to the latter bank, to pay it from his funds, and charge it to him.² When the note is presented, the teller of the paying bank informs the presenter that the note is good, in other words, that the maker has the funds in the bank to meet it. This information may be communicated verbally, by letter or by a memorandum on the note, ordinarily called a certificate. If the note were presented by an individual, the money would ordinarily be paid to him in satisfaction, and the note left with the paying bank. In the case of a bank, the note is taken back by the party owning it, to be returned the next day in the settlement of exchanges, as an item of credit in its favor, and against the certifying bank. This is the usual course of business in the city of New York. The correctness of this certificate is a matter which the certifying bank has the means of knowing, and is bound to state correctly. If the presenting bank relies upon its accuracy, and fails to charge the indorsers as upon non-payment on presentation, the certifying bank is estopped from denying the truth of its statement. Having asserted, of its own knowledge, that the maker had funds in its bank to meet the note, and the presenting bank, having omitted to charge its indorsers in reliance upon such statement, the certifying bank will not be permitted to go behind its own statements. The teller of the bank is the proper officer to make this statement,³ and his statement

¹ A slip for note.

² N. I. L. § 104.

³ See *Mussey v. Eagle Bank*, 9 Met. 306, *contra*.

binds the bank, whether accurate or erroneous. These principles are established in *Mead v. The Merchants' Bank of Albany*, 25 N. Y. 143, and in *Farmers' and Mechanics' Bank of Kent County v. Butchers' and Drovers' Bank*, 16 N. Y. 125.

In the present case the Irving Bank discovered its error, in stating that it had funds for the payment of Wilson's note, in sufficient time to prevent any loss in consequence of the error. It immediately notified the Seventh Ward Bank of the error, and in time to enable it to make a re-presentment, if necessary, and to charge the indorsers. No damage, therefore, could accrue to the latter bank from the erroneous information. They were bound to accept and to act upon the corrected information, if there were time and opportunity so to do. I agree with the courts below that the plaintiffs might have stopped at that point, and there would have been no liability on their part to the Seventh Ward Bank.

That bank went further, however, and, upon the refusal of the Seventh Ward Bank to cancel their certificate, paid to that bank the amount of the note, re-presented it at their own counter, and gave notice of non-payment to the defendants as indorsers thereof. This the judge, at Special Term, held to amount, in law, to a payment of the note. The General Term held otherwise, and reversed his judgment. It was agreed by the judge at Special Term, that the certificate of the paying teller was not a payment of the note. In this he was no doubt correct. It has also been held, and correctly, that the stamping a note as "paid," or marking it with a cancelling hammer, does not constitute a payment. *Scott v. Betts*, Lalor Sup. 363 and note; *Watervliet Bank v. Denio*, 608.

That the advance of the amount of the note, by the plaintiff, to the Seventh Ward Bank, was made to relieve them from an apprehended liability on their certificate, and was not intended by them to be in discharge of the note, is obvious from the immediate re-presentment of the note for payment, and notice to the indorsers that the same had not been paid. There could have been no other purpose in this than to charge the parties to an existing note. So, if they had intended a payment and discharge of the note, they would have allowed its return in the exchanges of the day following, in the usual course of business, instead of making a special payment of the same. The judge has not found, as a fact, that the note was intended to be paid by the Irving Bank, or that it was paid by them. He could not have so found upon the testimony, with propriety. He simply finds that the plaintiff paid "the amount of the note" to the Seventh Ward Bank, and he holds, as a legal result, that the advance of the money, under the circumstances stated, operated to discharge and cancel the note. In this conclusion I think he erred. The plaintiffs took the note as a purchaser, and acquired the rights of a holder. See *Watervliet Bank v. White*, 1 Denio, 608. In that case the *Watervliet*

Bank, at whose counter the note was made payable, received it from the holder for collection, and, having an account with the maker, which, however, was not good for the amount, charged it to him and paid it to the holder, at the same time placing upon it a cancelling mark. By the practice of the bank this mark only denoted that the note was charged. In a suit on the note by the bank, as indorsee against the maker, it was held that the bank held it with the rights of a purchaser, and could maintain the action.

In the present case the plaintiffs feared a liability to the Seventh Ward Bank, by reason of their mistaken certificate of the goodness of the note. They advanced to that bank its amount, for the purpose of re-presenting it for payment, notifying the indorsers, and holding it as an existing security. The defendants are indorsers duly charged. They received, themselves, the amount of the note upon its discount. It has never been paid, and is now an available security in the hands of the plaintiffs.

The order of the General Term should be affirmed, and judgment absolute ordered in favor of the plaintiffs for the amount of the note and interest.

All concur.

Judgment absolute.

THE FLOUR CITY NATIONAL BANK v. THE TRADERS'
NATIONAL BANK.

Supreme Court of New York, January, 1885. 35 Hun, 241.

So, by custom, an acceptance payable at a bank may be certified. Making a note or acceptance payable at bank, is equivalent to an order to the bank to pay on behalf of the maker or acceptor.¹

ACTION to recover a balance alleged to be owed to the plaintiff by the defendant. The defendant set up in its answer, as a counter-claim, an acceptance, payable at the plaintiff bank, and certified by it. Judgment for the plaintiff for the full amount of its claim; defendant appealed.

The facts further appear in the opinion.

[Argument reported.]

BARKER, J. The plaintiff and defendant in the regular course of banking business, had mutual accounts, called by bankers an exchange account, which was balanced each day, and such balance paid the next morning in cash or by draft on New York, at the option of the debtor bank. Each of these banks kept a similar account with the City Bank of Rochester, but as between the defendant and the City Bank, the balance was paid at the close of each day's transac-

¹ Cf. N. I. L. § 104.

tions. It was the custom of these banks, in dealing with each other, when one held a cheque, note, or acceptance, payable at one of the other banks, to present it for payment at such bank on the day it became due, and instead of receiving payment thereon, have it certified in the form hereafter mentioned by the bank at which it was payable, and for the bank presenting it to hold the same until the balance of the current day's business was paid and the same was entered in the exchange account at the time of the certification. The case states that a similar custom prevailed among all the banks in the city of Rochester.

The City Bank held a draft drawn by a Boston house on D. Gordon, of Rochester, payable to the order of its cashier, which was accepted by the drawee on the fifteenth day of December, and by him made payable at the plaintiff's bank, which fell due on the nineteenth of December. This draft was on that day presented by the City Bank to the plaintiff's bank for payment, and the teller indorsed thereon the customary certification, which was in the following words: "Certified: J. Thompson, Teller, Flour City Bank," and returned the draft to the City Bank and charged the acceptor's account with the amount of the same. On the same day there was a balance due on the daily exchange account to the Traders' Bank, from the City Bank, of \$8000. Such balance was paid by the cashier of the City Bank during the business hours on that day. And among other things, Gordon's acceptance, as certified, was taken by the Traders' Bank in payment. On balancing the exchange account of the same day between the Flour City Bank and the City Bank there was due to the former from the latter more than \$800, and there was a much larger sum due from the City Bank to the Flour City Bank on the previous day's balance of the same account. There was due the Flour City Bank from the defendant, the Traders' Bank, at the end of the same day's business, as the balance of the exchange account between them, more than \$800, and the next morning the defendant offered Gordon's acceptance, as certified, to the Flour City Bank toward the payment of such balance, which was refused and returned to the defendant. This action is to recover such balance from the defendant.

The defendant sets up in its answer Gordon's acceptance, as certified by the plaintiff, as a counter-claim. The City Bank did not open for the transaction of business after it closed on the nineteenth, and it was then insolvent, and the balance due by it to the plaintiff, as before mentioned, remains unpaid.

The act of the plaintiff in certifying Gordon's acceptance, and charging the amount to his account, was in legal effect a payment, and discharged the acceptor and drawers and the bank became a debtor to the holder for the amount of the same.¹ By the law

¹ N. L. L. § 205.

merchant, the certificate of a bank indorsed on a draft made payable at its counter, that the same is good is equivalent to an acceptance by the bank.¹ It implies that the acceptor has funds in the bank sufficient to pay the same, and that they are intended to be used for that purpose, and that the bank is authorized to make the application. It is an undertaking on the part of the bank that it will hold such funds for the use of the holder of the paper and pay them over to him on return of the draft. On these propositions, as thus stated, there is no disagreement between the counsel for the respective parties.

The Special Term held that the bank's obligation, assumed on making the certificate, was not negotiable in the sense of that term, and that its promise was past due when the draft and the certificate thereof was transferred by the City Bank to the defendant.

Accepting these propositions as sound law, the legal conclusions reached by the decision of the Special Term would be correct that the defendant received the draft subject to the offsets and counterclaim existing in the plaintiff's favor at the time of the transfer, as between it and the City Bank. In these views of the learned judge we are unable to concur; on the contrary, we concur with the defendant in its contention that the plaintiff's obligation, based on the certificate, possesses in a legal sense all the features of negotiability, and was not due until demand of payment and return of the certificate. Therefore the defendant was entitled to offset its claim as holder of the plaintiff's obligation arising out of its certification.

In considering the nature and extent of the plaintiff's liability arising out of the certification, it is important to keep in mind that the liability of the original parties to the draft terminated with the making of the certificate, and at the same time the bank's liability commenced, which is an original one based upon a good consideration moving from the holder. It is in short a contract partly written and partly in parol, to be enforced according to the intent and meaning of the parties. If the certificate had been placed upon a cheque drawn on the plaintiff's bank by one of its customers, there would be no room for a difference of opinion as to the nature and effect of the bank's undertaking, and that the same would not mature until after a demand made, and that the same would be regarded as a negotiable instrument in the commercial sense of the term.

The certification by a bank of an acceptance made payable at its counter, by one of its customers, has the same significance, and imports the same obligation on the part of the bank as a like certification of a cheque drawn on it, and has the same legal effect. In one instance it is an admission that the acceptor, and in the other that the drawer, has money on deposit in the bank, with which to pay the paper when presented for payment, and the bank will retain the

¹ N. I. L. § 204.

money on deposit to pay the holder, and will retain the same on deposit subject to the order of the holder. In the case of *The Merchants' Bank v. State Bank*, 10 Wall. 648, in stating the bank's liability based upon the certification of a cheque, the court said: "It is an undertaking that the cheque is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit, payable to the order of the depositor, or any other obligation it can assume. The object of certifying a cheque, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until, in the course of business, it goes back to the bank for redemption, and is extinguished by payment." Prior to and subsequent to the decision of this case, the courts of this State had given the same interpretation to the contract of certification, and held the bank's liability to pay as broadly as stated in the portion of the opinion we have quoted. *The F. and M. Bank v. The Butchers' and D. Bank*, 28 N. Y. 428; s. c. 14 N. Y. 623; *Meads v. The Bank of Albany*, 25 N. Y. 143; 2 *Daniel on Negotiable Instruments*, 254. In *Meads'* case one of the instruments, certified by the bank at which it was made payable, was a note, and the other was a cheque, and the court held the bank alike liable on each, and, as to the note, the court remarked: "The presentation of the note at the counter of the bank on its maturity, for payment, was in the ordinary course of business, and so was the making of the certificate then and there indorsed by the teller, certifying that the same was good. The legal effect and force of such certificate was that the maker had deposited funds in the bank to meet said note, and that the bank then held the same on deposit for that purpose, and would pay the amount upon request." In the case now here, the transaction in legal effect was a deposit of the money by the acceptor of the draft with the bank making the certificate, and not a loan in the ordinary acceptance of that term. This view of the transaction is taken by all the courts. It is a well settled law that, where money is placed on deposit, the depositor is not liable to an action, and the statute of limitations does not commence to run on his obligation, until after a demand of payment is made in pursuance with the terms of deposit. And such is this case, though it is in the power of the owner of the deposit to make it due and payable at any time, by its own act of making the demand. *Munger v. Albany City Nat. Bank*, 85 N. Y. 587.

If the object of the certificate is understood by both parties to be for the purpose of enabling the holder to use it as money, and the transferee may take it with the same sense of security as he could the notes of the bank, it is inconsistent with such views as to the

nature and effect of the contract to say, that it is not negotiable and is due when issued.

We have thus far viewed the case without considering what the effect of the custom of dealing between the banks has on the legal rights of the parties. We are unable to discern any fact or circumstance connected with the custom which affects the legal rights of the defendant. If paid a full consideration for the certified draft, and it was ignorant of the circumstance that, on the day of the certification, the City Bank was a debtor to the plaintiff, or that the balance of that day's transaction would leave the City Bank a debtor in a further sum to the Flour City Bank. The expectation and understanding on the part of the Flour City Bank, when it made the certification that the City Bank would return it the next morning to be used in discharge of its obligations, is not sufficient in and of itself to deprive a holder, taking title through the City Bank, of the protection which it has, arising out of the circumstance that it was not due and was also negotiable.

The defendant, conceding that it knew the fact that the City Bank paid the balances against it, at the close of each day's transaction, to the plaintiff in certificates of this character, it was still justified in receiving this paper, for it had no reason to suppose that the City Bank would not, in some proper way, discharge all its obligations to the plaintiff if the balance was found to be against it. Suppose that the City Bank was the agent of the drawer of the draft for the purpose of collecting the same, and on receiving the certificate had returned it to them, can it be said that the plaintiff could offset its balances against the City Bank and thus deprive the holder of the payment which the acceptor made? The law, by placing upon the plaintiff's obligation the features of negotiability and treating the same as not due until after demand puts an end to the plaintiff's contention.

Judgment reversed, new trial granted with costs to abide the event.

HAIGHT and BRADLEY, JJ., concurred.

MERCHANTS' NATIONAL BANK v. NATIONAL BANK OF THE COMMONWEALTH.

Supreme Court of Massachusetts, June, 1885. 139 Mass. 514.

If the drawee bank pays a cheque in mistake of funds, it may recover back the money so paid, unless it has been negligent in making reclamation, and the holder has changed his position.

CONTRACT to recover \$15,000, the amount of a cheque, dated September 3, 1883, drawn on the plaintiff by Benjamin F. Burgess and Sons, in favor of the Massachusetts Loan and Trust Company, and

by it deposited, on September 3, with the defendant. Trial in this court, before C. ALLEN, J., who reported the case for the consideration of the full court, in substance as follows:

The plaintiff and defendant banks are members of an unincorporated association called the Boston Clearing-House Association, whose rules and course of business are the same as set forth in the cases of *Merchants' Bank v. Eagle Bank*, 101 Mass. 281, and *Exchange Bank v. Bank of North America*, 132 Mass. 147, to which reference is to be made.

Benjamin F. Burgess and Sons were depositors with the plaintiff bank and kept a bank account with it, and Benjamin F. Burgess was one of the plaintiff's directors. They were indebted to the plaintiff in the sum of \$83,000 on three notes, payable on demand, with a pledge of warehouse receipts for twelve hundred and seventy hogsheads of sugar as collateral security, and in the further sum of \$129,500 on three other notes, payable on demand, with a pledge of United States bonds and other securities as collateral. Demand was made for the payment of the notes for \$83,000 on the 23d or 24th of August, 1883, and within two days after the demand, Burgess told the plaintiff's president that he had sold or bargained to sell two hundred and seventeen hogsheads of the sugar; and the warehouse receipts were thereupon intrusted to Burgess, as agent of the bank, to enable him to deliver the sugar so sold, with the understanding that the money received for the sugar should be brought to the bank and applied on the debt. The sugar was sold on August 23, to Nash, Spaulding, and Company, who gave their cheque for \$7500, dated September 1, and payable to Benjamin F. Burgess and Sons. This cheque was deposited with the plaintiff by that firm, on September 1, to the credit of Benjamin F. Burgess and Sons, and the same was entered to their credit in their bank account, the plaintiff not knowing at the time, nor until September 5, that it came from the sale of the sugar. . . .

On the morning of September 4, there was an apparent balance of \$17,145.56 to the credit of the firm of Burgess and Sons, the item of \$7500 being included as an item to their credit, entered on September 1, as above stated. During the forenoon of September 4, three cheques of Benjamin F. Burgess and Sons, of \$1000, \$225, and \$200, respectively, were paid over the counter by the plaintiff. On the same day the cheque in controversy in this action came from the defendant bank to the plaintiff bank through the clearing-house, where it has been provisionally paid, in accordance with the usual course of business in the clearing-house. This cheque was received by the plaintiff at about noon, and was in the first instance entered to the debit of Benjamin F. Burgess and Sons on the plaintiff's books; but at about one o'clock the president of the plaintiff received [a communication which] led him to think that Burgess and Sons were in financial

trouble, and he then discovered that no payment from the avails of the sugar had been made upon the indebtedness for which the sugar had been pledged as collateral security. He looked at the condition of their bank account, and immediately gave directions to send back the cheque of \$15,000 to the defendant, and to demand the repayment of the money, as the cheque was not good; and the entry of it in the account of Burgess and Sons was erased. . . .

Where there is not enough money on deposit to pay a cheque in full, the ordinary custom is to return the cheque as not good.

The plaintiff held no surplus of security upon either branch of the indebtedness of Burgess and Sons which could be applied to make good the \$7500. The president of the plaintiff bank, who was the only principal officer testifying, and who gave the directions for the return of the cheque, had no knowledge on September 4 that the sugar pledged as collateral security was not sufficient to secure all of the notes of Burgess and Sons held by the bank for which the collateral was given.

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[Argument not reported.]

DEVENS, J. The rules and course of business of the unincorporated association called the Boston Clearing-House Association have been so set forth in the recent decisions of this court that they do not require to be here fully restated. They were adopted solely for the purpose of facilitating exchanges and the adjustment of accounts between the banks. By a contract between them, an association is formed, which is their common banker. To this association each bank, which is indebted by reason that more cheques, etc., are presented, as drawn upon it, than it presents, as drawn against the other banks who are members, pays the balance found due from it to the association, while each bank that shows a balance in its favor receives from the association the amount by its cheque. Mistakes that may be made in this computation, because cheques are not good, are not settled by the association, but between the banks themselves; and such cheques are to be returned by the banks receiving the same to the banks from which they are received as soon as it shall be found that they are not good, "and in no case are they to be retained after one o'clock." To the regulations of this association, the customers of the banks are not parties, and, whatsoever effect is to be given to them as between the banks, their customers are not in a situation to claim the benefit of them, nor are they liable to be injuriously affected by them. *Merchants' Bank v. Eagle Bank*, 101 Mass. 281; *Bank of North America v. Bangs*, 106 Mass. 441; *Manufacturers' Bank v. Thompson*, 129 Mass. 438; *Exchange Bank v. Bank of North America*, 132 Mass. 147. By these regulations, it was, in substance,

agreed in the case at bar, that, if Burgess and Sons had to their credit a sum sufficient to meet the cheque for which they were entitled to draw, the amount of which is here demanded, the provisional allowance of it at the clearing-house should stand; but that, if it appeared on investigation that they were not entitled to draw for any such sum, the cheque should not be retained by the plaintiff bank after one o'clock. The bank which had sent the cheque to the clearing-house would then be notified that it was not good, and that repayment of the amount of it would be expected by the bank on which it was drawn.

The cheque was not returned to the defendant bank until after one o'clock. It is not disputed by the plaintiff, that if, in consequence of this, the defendant had changed its position, as if it had paid over the amount of the cheque to the owner, who had deposited it with the bank for collection, the bank should not suffer; but it contends that when, by a mistake as to a matter of fact, it has delayed the return of the cheque until after one o'clock, this cannot be taken advantage of by the bank on behalf of the owner of the cheque, there having been no change in its position in the interval between one o'clock and the actual return of the cheque.

The case of *Merchants' Bank v. Eagle Bank*, *ubi supra*, goes far to decide the case at bar. It was there held that the manifest purpose of the provision in the clearing-house rules was to fix a time at which the creditor bank was authorized to treat the cheque as paid, and so deal with it in its relations with others. The court declined to adopt the theory that a failure to return a bad cheque before one o'clock to the bank sending it through the clearing-house would work a forfeiture of the right to return it, or, of itself, constitute a bar to an action to recover its amount; and held that a failure to comply with the stipulation as to returning the cheque would leave the parties in the same position as when a payment is made under a mistake of fact in the ordinary way. This case has been since cited with approval. *Manufacturers' Bank v. Thompson*, and *Exchange Bank v. Bank of North America*, *ubi supra*.

In *Preston v. Canadian Bank of Commerce*, 23 Fed. Rep. 179, it was held otherwise, and there decided that a mistake discovered after half-past one o'clock, which was there the hour for returning cheques, could not be corrected by the bank making it, nor the cheque then returned. It is said by Judge Blodgett, referring to the case of *Merchants' Bank v. Eagle Bank*, *ubi supra*, "The Massachusetts court puts its decision on the ground that you may correct a mistake of this kind at any time after it is discovered, if it places the party to whom the cheque is returned in no worse condition than it would have been in if it had been returned within the stipulated time; thus overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time." But we have

not overlooked the right of parties to make such agreement as they choose. The question is as to the interpretation of the rule which they, as members of the clearing-house, have adopted.

The rule is, "Whenever cheques which are not good are sent through the clearing-house, they shall be returned by the banks receiving the same to the banks from which they were received as soon as it shall be found that said cheques are not good: and in no case shall they be retained after one o'clock." If it were intended that mistakes should never be corrected unless discovered by one o'clock, this should in terms explicitly appear. As it does not, it seems to us the more correct interpretation to hold that the rule authorizes the bank receiving the cheque, after one o'clock arrives and the cheque is not returned, to treat it in all transactions as if it were good. If, therefore, the bank changes its position, it will suffer no loss by reason of it. On the other hand, if the mistake is discovered after one o'clock, and the bank receiving the cheque has not changed its position by reason of the expiration of the time, it should rectify the mistake when reasonable care has been exercised by the bank on which it was drawn.

In the case at bar there was no change of circumstances, after the time when the defendant had a right to treat the cheque as paid and before it was returned, which would in any way subject the defendant to loss, or render it unjust for the plaintiff to recover. The fact that the defendant gave credit to its depositor in this interval did not make the defendant liable to such depositor when a mistake was discovered which showed it to have been erroneously done.

The mistake made by the plaintiff was such as would bring the case within the rule which has heretofore been held applicable on this subject. There was no carelessness, as in *Boylston National Bank v. Richardson*, 101 Mass. 287, where the paying teller neglected to examine the account of the drawer of a cheque, which account had not varied materially for a month, and which had not been sufficient to meet the cheque for three months, and paid it without examination. Such a transaction showed no mistake of fact, in any legal sense, but laches simply. The teller in that case was not misled in any way, and had no reason to suppose the account of the depositor was otherwise than as it actually appeared.

The mistake in the case at bar was, that the account of Burgess and Sons with the plaintiff bank was really different from that which appeared on its books, and this was effected by the wrongful act of Burgess. He had received a cheque for \$7500 for property belonging in specie to the bank, which it was his duty to have delivered to the bank as its property. Instead of doing this, he deposited the cheque as the property of Burgess and Sons, and by that act obtained for them a credit on the books of the plaintiff bank to which they were

not entitled. Against the false balance thus produced by depositing the money of the bank as if it were their own, Burgess and Sons fraudulently drew the cheque in controversy, and it led to the retention of the cheque until a few minutes after one o'clock.

But if the money paid under a mistake of fact may be recovered, and if the credit to which the defendant was entitled at one o'clock might be recalled on discovery of such a mistake, it is urged that the plaintiff should then be able to show mistake, misapprehension, or ignorance of some definite and material fact which directly affected the obligation of the plaintiff to pay the cheque; and that the credit was sought to be recalled under a vague apprehension of insecurity produced by reports of the embarrassment of Burgess and Sons. This, it is contended, is not sufficient, even if subsequent investigation has shown that the apparent credit of Burgess and Sons with the plaintiff bank was fraudulently obtained in the mode above stated. It appears by the report that the president of the plaintiff bank, being led to think that Burgess and Sons were in financial trouble, then discovered that the avails of the sugar confided to Burgess to sell had not been received by the bank upon the indebtedness for which it was pledged as collateral security; and, looking at the condition of Burgess and Sons' bank account, he directed the return of the cheque.

But even if, at the time of the return of the cheque, the president could not have stated the exact way in which the mistake was made, when subsequently investigated, it is shown to have arisen from the same transaction to which he then attributed it, and which caused him to direct the return of the cheque, namely, the sale of the sugar confided to Burgess. He supposed that the proceeds of the sugar had not been paid into the bank at all, while in fact they had been paid in, but in such a manner as to obtain, by spoken or acted falsehood, a wrongful credit in favor of Burgess and Sons.

Nor can it be seen why the plaintiff bank might not have returned the cheque the next day, if there had been no change in the circumstances, and if it had then discovered, as it actually did, the exact character of the mistake. It cannot affect the plaintiff unfavorably that it offered to do so earlier, and on the same day it received the cheque, even if its president could not then formally state the exact mode in which the mistake had occurred.

The defendant further urges that there has been such laches on the part of the plaintiff bank in its dealings with Burgess that it is not entitled to recover. *Dana v. Bank of the Republic*, 132 Mass. 156. On August 23 or 24, 1883, demand was made upon Burgess for payment of demand notes which were then deemed to be amply secured by sugar as collateral security. Two days after this, Burgess told the plaintiff's president that he had sold or bargained for the sale of two hundred and seventeen hogsheads; and the warehouse receipts were delivered to him, as agent of the bank, to enable him to transfer the

sugar sold, with the understanding that the money received therefrom would be applied upon the debt for which it was held as collateral security. A cheque was received therefor, on September 1, of \$7500, which was the one wrongfully deposited by Burgess to the credit of Burgess and Sons. The laches which the defendant alleges is in failing to look after the proceeds of this sugar until September 4. But up to this time the plaintiff bank had not supposed Burgess and Sons to be in financial straits; they had always been allowed to dispose of the goods pledged by them as collateral, and had always faithfully accounted for the proceeds of the same. That no suspicions were in fact excited until September 4 is quite clear, and the circumstances are not such that we can say there has been laches on the part of the plaintiff that should deprive it of its remedy for the mistake into which it was led by Burgess's fraud.

At the trial before a single judge, the defendant contended that the remedy of the plaintiff, if any, was not against the defendant, but against the Massachusetts Loan and Trust Company; and that the plaintiff got the benefit of the sale of the sugar by applying the proceeds on another loan. Neither of these positions is tenable. Where a party who has paid money is entitled to recall it, he may do so, provided the agent has not paid it over to the principal, and that no change has taken place in his situation which would render it unjust to him. The fact that the agent has passed the money in account with his principal, without any new credit being given to the principal, will not of itself be sufficient to enable the agent to retain it. Story on Agency, § 300.

Nor can the plaintiff obtain any benefit from the sale of the sugar by Burgess, except by this action, which, to the extent to which it is maintained, will restore to the plaintiff that which by Burgess's fraud it has been induced to pay out.

The question remains, how much the plaintiff is entitled to recover. By the course of dealing between the banks composing the Clearing-House Association, when there is not enough money on deposit to pay a cheque in full, the ordinary custom is to return it as not good. This custom has no application to the inquiry how much the plaintiff may now recover, which is one outside of the clearing-house rules. These were not complied with by the return of the cheque within the time, and cannot control in determining how much shall be returned after payment of it has been made. If no mistake had been made, and the plaintiff had followed the custom, it is true that it would have refused the cheque entirely, and thus have kept in its control the other funds of Burgess and Sons not the subject of mistake, which it might have applied in offset to the other claims which it held against Burgess and Sons. But the defendant is not bound to indemnify the plaintiff against all the incidental consequences of its mistake, but only to return that money which was

the subject of the mistake. So far as Burgess and Sons were entitled to draw, the defendant has now a right to hold. The fact that, if Burgess and Sons had overdrawn, and this had been known to the plaintiff, it would have wholly refused the cheque, should not deprive the defendant of that which it was the duty of the plaintiff to pay him upon a cheque properly drawn, when it has itself honored the cheque as it was actually drawn. The plaintiff bank was entitled, if it saw fit, to pay the cheque to the amount actually due from it to Burgess and Sons, if the defendant was willing to accept that sum. To this Burgess and Sons could have made no objection.

Nor is the plaintiff here entitled to recover any money to the use of Burgess and Sons. It would do so if it recovered the money for which Burgess and Sons had a right to draw, even if, when recovered, it would go to the use of Burgess and Sons only by the payment of their other debts or liabilities to the plaintiff bank.

The money which was the subject of the mistake was \$7500. In the forenoon of September 4, and necessarily before the cheque of the defendant could be treated as paid, three cheques, together amounting to \$1425, were drawn from the deposit of Burgess and Sons, which was nominally \$17,145.46. These two sums being deducted from this deposit, there remained \$8220.46, for which Burgess and Sons had a right to draw. The amount which the plaintiff is entitled to recover is the difference between this sum and \$15,000, with interest from the date of the writ.

Judgment accordingly.

NOTE. — As to the right to recover back money paid under a mistake of fact, recent English authority is in accord with the principal case. *Imperial Bank of Canada v. Bank of Hamilton*, 1903, A. C. 49. The case, as stated in the opinion by Lord Lindley, was as follows:

“The question raised by this appeal is whether the Bank of Hamilton is entitled to recover from the Imperial Bank of Canada a sum of \$495, paid to it in respect of a cheque under the following circumstances.

One Bauer was a customer of the Bank of Hamilton, and he drew a cheque upon that bank for \$5. The word ‘five’ was written, and a considerable space was left between that word and the next words printed on the cheque. The cheque was dated January 25, 1897, and on that day Bauer took it to the Bank of Hamilton and got it marked or certified with the bank’s stamp; he then took it away with him. The effect of this marking or certifying was examined and explained by this Board in *Gaden v. Newfoundland Savings Bank*, 1899, A. C. 281, at p. 285. The effect was to give the cheque additional currency by showing on its face that it was drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of Bauer, who drew it, the credit of the Bank of Hamilton, on which it was drawn.

The cheque was a good cheque for \$5, and if it had not been altered the Bank of Hamilton would have paid it as a matter of course, and no difficulty would have arisen. But after Bauer had got it marked he wrote in the word ‘hundred’ after the word ‘five’. The cheque then appeared to be a certified cheque for \$500. There can be no doubt that the condition of the cheque

when certified afforded opportunity for this fraudulent alteration ; and if the principle laid down in *Young v. Grote* (1827), 4 Bing. 253 ; 29 R. R. 552, could still be acted upon, the Bank of Hamilton would, as between themselves and an innocent holder for value, be estopped from denying that the cheque was a certified cheque for \$500. But after the decision of the House of Lords in *Scholfield v. Earl of Londesborough*, 1896, A. C. 514, it was hopeless to contend that by the law of England the Bank of Hamilton was not at liberty to prove that the cheque had been fraudulently altered after it has been certified by the bank. Whether the French law, which prevails in Lower Canada, is the same in this respect as the law of this country and of Ontario has not been determined ; for the French law has no application to this case.

Bauer took the cheque as altered to the Imperial Bank of Canada, and opened an account with it. The cheque was placed to his credit ; he forthwith drew cheques upon the account so opened, and those cheques were honored in the usual course of business. The cheque in question was passed by the Imperial Bank of Canada through the clearing-house at Toronto, and was paid by the Bank of Hamilton on the morning of January 27, 1897, the fraud not having been then discovered.

It is proved by the evidence that certified cheques, apparently in order and presented through the clearing-house, are paid as a matter of course, and that it is not usual with bankers to turn to their customers' accounts on the day marked cheques are presented for payment through the clearing-house to see whether there is anything wrong before paying them. It is, however, usual to check the returns with the customer's accounts the next day, and then to enter the cheques paid the day before. In conformity with this practice, the Bank of Hamilton paid the cheque on January 27 without looking at Bauer's account in their ledger ; but on the next day, i. e. January 28, they turned to it, and at once discovered the fraud. The Bank of Hamilton immediately gave notice to the Imperial Bank of Canada and demanded repayment of \$195, being the amount paid by the Bank of Hamilton in respect of the cheque, less the \$5 for which it was drawn and certified. This demand not having been complied with, the present action was brought by the Bank of Hamilton to recover the \$195. The action was defended on three grounds, namely, 1st, because the Bank of Hamilton was negligent in marking the cheque with the blank in it ; 2d, because the Bank of Hamilton was negligent in paying the forged cheque without first turning to Bauer's account ; 3d, because notice was not given to the Imperial Bank of Canada on January 27, the day on which the cheque was paid.

The action was tried by MacMahon, J., without a jury, and he gave judgment for the plaintiffs, namely, the Bank of Hamilton. From this judgment the Imperial Bank of Canada appealed, and the Court of Appeal affirmed the judgment of MacMahon, J., but Armour, C. J., dissented. From this decision the Imperial Bank of Canada again appealed to the Supreme Court, which again affirmed the decision appealed from, Gwynne, J., however, dissenting. The present appeal is from their decision.

The learned counsel for the appellants did not seriously rely upon the first of the three grounds of defence, feeling it to be untenable after the decision in *Scholfield v. Earl of Londesborough*, 1896, A. C. 514,¹ to which reference has already been made. They relied on the second and third grounds, on which alone there was any difference of opinion in the courts below.

As regards negligence in paying the cheque: It cannot be denied that

¹ *Post*, p. 449.

when the Bank of Hamilton paid the cheque on January 27, it had the means of ascertaining from its own books that the cheque had been altered. But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly v. Solari*, 9 M. & W. 28, that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since, and their Lordships consider it applicable to the present case. There was nothing on the face of the cheque to excite suspicion, nor to lead the clerk who cashed the cheque to take the unusual course of referring to Bauer's ledger account to see if all was right before cashing it. Moreover, even if negligence in this respect could be imputed to the Bank of Hamilton, such negligence did not induce the Imperial Bank of Canada to treat the cheque as good and to give Bauer credit for its amount. That had been done already. These were the reasons which induced the courts below to decide against the second ground of defence; and their Lordships have no hesitation in coming to the same conclusion.

There remains the third ground. . . .

The prejudice which it is suggested that the Imperial Bank of Canada may have suffered, from want of notice of dishonor on January 27, consists in their inability to take proceedings on that day against Bauer for the fraud which he had committed. But no one suggests that Bauer could have paid anything if he had then been proceeded against. The bank was not deprived of any of its rights against him, nor was its position altered by reason of notice of the forgery not having been given until the day after the bill was paid.

The cheque was drawn and certified, i. e. for \$5, was never dishonored, and no question arises as to that. The cheque for the larger amount was a simple forgery; and Bauer, the drawer and forger, was not entitled to any notice of its dishonor by non-payment. See the Bills of Exchange Act, 1882, s. 50, sub-s. 2 (c). There were no indorsers to whom notice of dishonor had to be given. The law as to the necessity of giving notice of dishonor has therefore no application. The rule laid down in *Cocks v. Masterman*, 9 B. & C. 902; 33 R. R. 365, and recently reasserted in even wider language by Mathew, J., in *London and River Plate Bank v. Bank of Liverpool*, 1896, 1 Q. B. 7, has reference to negotiable instruments, on the dishonor of which notice has to be given to some one, namely, to some drawer or indorser, who would be discharged from liability unless such notice were given in proper time. Their Lordships are not aware of any authority for applying so stringent a rule to other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their Lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay in giving it.

Their Lordships, therefore, will humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs."

In *Cocks v. Masterman*, 9 B. & C. 902, a bill of exchange purporting to have been accepted by X, payable at the plaintiffs' bank, was presented on the day of maturity by the defendant, and paid by the plaintiffs. On the following day the plaintiffs discovered that the acceptance was a forgery, and immediately gave notice to the defendant. It was held that the plaintiffs could not recover back the money, since the holder, the defendant, was entitled to know on the day of maturity whether the bill would be honored, and if it was dis-

honored, was entitled to give notice to prior parties on that day; by the plaintiffs' delay the defendant has been deprived of that right, and hence was prejudiced. In *London and River Plate Bank v. Bank of Liverpool*, 1896, 1 Q. B. 7, this principle was carried further, and it was held that where an acceptor had paid a bill to a holder claiming under a forged indorsement, the acceptor could not recover back the money, if the holder's position might possibly have changed after payment and before reclamation. In delivering the opinion of the court, Mr. Justice Mathew said, "A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, and if he is subsequently sought to be made responsible to hand it back." This rule is expressly limited in *Imperial Bank of Canada v. Bank of Hamilton* to those cases where there is loss to the defendant through failure to give notice to drawer or indorsers, which failure was due to the plaintiff's delay in giving notice that the payment was made in mistake; in all other cases the plaintiff may recover, unless he has been negligent in giving notice of the mistake and the defendant has changed his position. See *Bank of Commerce v. Union Bank*, 3 Comst. 230, *ante*, p. 121; *Leather Bank v. Morgan*, 117 U. S. 96; *Dana v. Bank of Republic*, 132 Mass. 156; *Shepard Lumber Co. v. Eldridge*, 171 Mass. 516; *Bank of North America v. Bangs*, 106 Mass. 441. But *quære*, was not the statement *supra* of Mr. Justice Mathew founded on the actual custom of merchants in London?

There is reason to believe that the rule in Massachusetts as to payments through the clearing-house, and the effect of the rule of the clearing-house that an instrument paid under a mistake should not be retained after a time fixed by the association, is not according to the custom among banks, and hence that it is not in accordance with sound theory. It is important to notice in this particular the present rule of the Boston Clearing-House Association, as amended since the decision of *Mechanics' Bank v. Bank of Commonwealth*, *supra* and cases cited. Article 9, sec. 6, provides that "All cheques, drafts, notes, or other items¹ sent through the Clearing-House and found not good, . . . shall be returned directly to the Bank from which they were received, and this Bank shall immediately refund to the Bank returning the same, . . . the amount received through the Clearing-House for said items thus returned to it.

Except on Saturdays, all such returned items shall be *delivered* not later than one o'clock, P. M.; and on Saturday, not later than twelve o'clock, noon."

¹ Cf. *National Exchange Bank v. National Bank of North America*, 132 Mass. 147, and *Atlas National Bank v. National Exchange Bank*, 176 Mass. 300.

CHAPTER VII.

DRAWER'S CONTRACT.

DICKINS v. BEAL.

Supreme Court of the United States, January, 1836. 10 Peters, 246.

The contract of the drawer of a bill of exchange is conditional and secondary;¹ presumptively, he is entitled to notice of dishonor but this presumption may be overturned by evidence that he had no reasonable grounds to expect that his bill would be honored.²

ACTION by the holder of a bill of exchange against the drawers and indorsers. The facts are stated in the opinion.

[Argument not reported.]

BALDWIN, J. Samuel Dickins, the defendant, and Jesse Taylor were partners, transacting business at Hazelwood, Madison County, Tennessee, which was the residence of Dickins. On the 6th of December, 1832, Taylor drew a bill of exchange for \$1448, on Wilcox and Feron, New Orleans, in favor of Dickins, payable on the 1st of May, 1834, which Dickins indorsed to the plaintiff. On the same day, Dickins and Taylor drew two other bills on the former house, in favor of the plaintiff; one for \$2802, payable on the 1st of May, the other for \$1590, payable the 1st of April, 1834. The three bills were dated at Hazelwood, Madison County, Tennessee; presented to the drawees on the 3d of June, 1833, for acceptance; which being refused, they were protested, for non-acceptance, by a notary public; who, on the same day, gave notice thereof to the drawer and indorser of the first, and the drawers of the other two, by letters put into the post-office, addressed to them at Hazelwood aforesaid. It was testified by the notary that, not knowing of any other residence of the parties than that designated by the caption of the bill, he forwarded the notices accordingly, after inquiring of persons likely to know.

It appeared that all the bills were drawn without funds, or authority to draw; nor was any evidence offered to show that either Dickins or Taylor had any reason to think that their bills on Wilcox and Feron would be honored, except two letters from Wilcox and Feron,

¹ N. I. L. § 78.

² Id. §§ 96, 131.

dated the 1st of December, 1831, addressed to the cashier of the branch Bank of the United States, at Nashville. In one they say: "Messrs. Dickins and Taylor are authorized in making negotiations, to value on our house in New Orleans, for say \$10,000; in such form and at such time as they may think proper, and same will be duly honored." In the other: "Our friend, Colonel Samuel Dickins, is authorized in negotiating with your institution, to value on our house in New Orleans, at any time, for such sums as he may think proper; and same will be duly honored by W. and F."

These letters were in the handwriting of Wilcox and Feron, and in the possession of Dickins; they were offered to show that he was entitled to regular notice of the protest of the bills drawn by Dickins and Taylor; but were rejected by the court as incompetent.

The plaintiff resided at New Orleans. Jackson is the county town of Madison County, Tennessee, about fourteen miles from Hazelwood, the defendant's residence, which is on Spring Creek, about half or three-fourths of a mile from a post-office called Spring Creek Post-office; of which the defendant was postmaster, and did his business there in June, 1833. This was known to plaintiff, who, about and before the 3d of June, 1833, directed a letter to defendant at "Hazelwood, Spring Creek, Madison County, Tennessee," and one to "Colonel Samuel Dickins, postmaster, Spring Creek, Madison County, Tennessee." At the trial, the plaintiff offered to prove by the postmaster at Nashville, and his deputy, that that place was the distributing office for letters from New Orleans intended for West Tennessee, including the county of Madison; that, in June, 1833, they knew defendant was postmaster at Spring Creek; that if, in distributing the mail, they had seen a letter addressed to defendant at Hazelwood, they would have sent it to Spring Creek Post-office; also to prove, by the post-office books at Nashville, that, on the 13th of June, 1833, the New Orleans mail arrived at Nashville; and, on the 14th, a package was sent to Spring Creek Post-office, which had come to Nashville for distribution, and was rated at fifty cents postage.

To this evidence it was objected, by the defendant, that, inasmuch as the putting a letter into the post-office containing notice of a protest, properly directed, forms a conclusive legal presumption that such notice was duly given and received, it was also a legal presumption that the notice went to the place directed and no other; and that the plaintiff was precluded from showing, either that the destination of the letter was changed on its passage, or was in point of fact sent to any other place.

The court overruled the objection, and the evidence was received.

It was also testified that letters from New Orleans for the western district of Tennessee come to Nashville for distribution, unless there was a river mail, in which case they would be delivered at Memphis

and be distributed thence; other evidence was also given in relation to the course of the mail, and the usage of the post-office at Nashville, which is needless to recite. In their charge to the jury, the court instructed them that the usage of a distributing office, in conformity to law and the authorized regulations of the department, and in the discharge of the official duties of the officers employed, might properly be taken into their consideration of the question submitted to them; which was, whether, from the usual course of the mail, and the usage as proved, the notice of the protest would necessarily reach Spring Creek Post-office, or would fail to reach it, or be carried to some other office; in the first case, the court instructed them that the notice was served on the defendant; but in the other, the drawer was discharged unless actual notice was served.

Several instructions were prayed by the defendant, which the view taken by the court renders it unnecessary to consider, as they relate to matters not material to the cause; and, if given either way, they could not affect the right of either party. One, however, deserves particular notice, which was, "that the evidence of the notary was not sufficient proof that a legal notice was sent; but that he ought to have set out a copy of the notice, or stated its contents, in order that the court might judge whether it was sufficient." The court refused to give this instruction; but stated that it might reasonably be inferred from the nature of the notice, and from the fact that notice was given, as stated in the deposition.

Exceptions were taken to the decision of the court on the questions of evidence, and the various matters given in charge to the jury.

The first question which arises, is on overruling the admission in evidence of the two letters from Wilcox and Feron to the cashier of the branch bank at Nashville.

It was in full proof that Taylor and Dickins never had a dollar in the hands of Wilcox and Feron to pay any draft drawn on the latter, nor any money or other property in their hands to meet the bills at the time they became due, or any funds in their hands when presented and protested for non-acceptance. No proof was offered that Dickins and Taylor, or either of them, had made any consignment to Wilcox and Feron, as an expected or anticipated fund on which to draw. It was also proved that Jesse Taylor had neither funds nor property in the hands of the drawees, when his bill in favor of Dickins was presented for acceptance, or when it became due; and that they had received no advice of such bill; and that the two bills of Dickins and Taylor, drawn in favor of the plaintiff, one for \$2802, and the other for \$1598, balanced their account on his books. It is clear, therefore, that this transaction was not a negotiation within the meaning or intention of these letters; they evidently referred to negotiations at the bank, or within the sphere of its operations in the commercial transactions of the firm; the

one referring to Dickins alone was expressly limited to negotiations with that bank. The remittance of these bills to New Orleans in payment of an antecedent debt to the plaintiff, was in no sense of the term a negotiation of them, and was so utterly inconsistent with the evident object of the letters, that the most remote expectation could not have been entertained that they would have been accepted.

A mercantile house conducting operations at Memphis and New Orleans, would, in the course of their business, lend their credit in anticipation of consignments, while they would refuse it to pay the debts due to other persons; these considerations could not escape the consideration of Dickins and Taylor, when they sought to make Wilcox and Feron their creditor, instead of Beal by such a fraudulent abuse of the letters of credit. Had these bills come to the hands of an innocent holder in the course of trade, with a knowledge of these letters, the case would have been different; or if the bank had negotiated them, there would have been a reasonable expectation that they would have been honored; but Dickins and Taylor could have entertained no such expectations. The letters were, therefore, properly excluded, and the case must be considered as if they had not existed.

An established exception to the general rule that notice of the dishonor of a bill must be given to the drawer is, where he has no funds in the hands of the drawee; but of this exception there are some modifications. . . .

If the drawer has made or is making a consignment to the drawee, and draws before the consignment comes to hand. . . .

If the goods are *in transitu*, but the bill of lading is omitted to be sent to the consignee or the goods were lost. . . .

If the drawer has any funds or property in the hands of the drawee, or there is a fluctuating balance between them in the course of their transactions . . . ; or a reasonable expectation that the bill would be paid. . . . Or if the drawee has been in the habit of accepting the bills of the drawer without regard to the state of their accounts, this would be deemed equivalent to effects. . . . Or if there was a running account between them. . . .

In all such cases, the drawer is considered as justified in drawing, as so far having a right to draw, that "the transaction cannot be denominated a fraud; for in such a case it is a fair commercial transaction, in which the drawer has a reasonable expectation that his bill will be honored, and he is entitled to the same notice as a drawer with funds, or authority to draw without funds." . . .

But unless he draws under some such circumstances, his drawing without funds, property, or authority, puts the transaction out of the pale of commercial usage and law; and as he can in no wise suffer by the want of notice of the dishonor of his drafts, that it is deemed a useless form. "Notice, therefore, can amount to nothing,

for his situation cannot be changed." In a case where he has no fair pretence for drawing, there is no person on whom he can have a legal or equitable demand, in consequence of the non-payment or non-acceptance of the bill. This is the rule, as laid down by this court, in *French v. The Bank of Columbia*, 4 Cranch, 153, 164, or a very able and elaborate review of the then adjudged cases, which is fully supported by those since decided in England, and in the Supreme Court of New York. The case of the defendant falls clearly within the rule applicable to bills drawn without funds, or any *bona fide*, reasonable, or just expectation of their being honored; and notice of their dishonor was not necessary. The case requires no opinion whether notice of the dishonor of Taylor's bill in favor of Dickens was necessary, and we forbear to express any.

[A question of manner of giving notice.]

Judgment affirmed.

CAREW v. DUCKWORTH.

Court of Exchequer of England, Trinity, 1869. L. R. 4 Ex. 818.

The drawer of a cheque is presumptively entitled to notice of dishonor; and this presumption may be overturned by showing want of reasonable expectation that his cheque will be honored.¹

DECLARATION by plaintiff as holder of the defendant's cheque on the Agra Bank, Limited, for £30, averring due presentment and non-payment, and excusing notice of dishonor on the ground that the bank "had not in their hands sufficient or any effects of the defendant for payment of the said cheque or order, nor had they received any consideration for the payment by them of the said cheque or order, nor had the defendant at any time any reasonable ground to expect that the said Agra Bank, Limited, would pay the said cheque or order, nor has the defendant sustained any damage by reason of not having notice of the non-payment by the said Agra Bank, Limited, of the said cheque or order."²

Plea traversing the averments excusing notice. Issue.

It was proved that the cheque was given after banking hours on the 25th of February, and it was then agreed that it should not be presented for several days. The defendant then had £106 in the bank. The cheque was presented on the 10th of March, and dishonored.

On the morning of March 2d the balance in the defendant's favor was £18 17s. 2d.; in the course of the day £48 6s. 8d. was paid in, and

¹ Cf. N. I. L. §§ 131, 202.

² The presumptive duty to notify the drawer of a *cheque* of its dishonor should be noticed. See Chitty, *Precedents in Pleading*, 117, 3d Eng. ed., whose form is followed *supra*, and is approved in *Kemble v. Mills*, 1 M. & G. 757, 769; Bigelow, *Bills and Notes*, 76.

£58 5s. 2d. was drawn out, leaving a balance of £8 18s. 8d.; and from that day to the 10th of March the largest sum in the bank to the defendant's credit was £9 8s. 4d. On the 10th £107 was paid in, and £99 drawn out, which left to the defendant's credit a balance of £1 15s. 11d.

It was also proved that the defendant had on a former occasion overdrawn his account, and that the bank had thereupon given him notice they would not honor overdrafts.

The jury found all the averments of the declaration in favor of the plaintiff. A verdict was entered for the plaintiff, with leave to the defendant to enter a verdict for him. A rule having been obtained accordingly, and for a new trial, on the ground that the verdict was against evidence, the cause came to argument.

[Argument reported.]

BRAMWELL, B. I cannot think that the law on this point is in a very satisfactory condition. The true rule should be, that no notice of dishonor is required where it would convey no information, that is, when the party sued knew beforehand that the bill would not be paid; but that when he did not know, it is right that he should be informed of the non-payment. If this rule should be adopted, the question would be, did he, practically speaking, know beforehand that the bill would not be honored? This may depend upon a variety of circumstances; he might think that the cheque would be honored by favor, though in fact there were no assets to meet it. But though this ought to be the rule, at all events in the case of cheques (and I am not sure that it is not the rule in fact), yet it is not always to be found laid down in those terms, and perhaps it could not be established without doing violence to some of the cases.

The first question, then, is, had the defendant funds in the hands of the bank to meet this cheque? Which here becomes the question, whether there was evidence from which the jury could find this fact in the negative. The defendant had the sum of £106 in the bank at the time when he drew the cheque, but the question of his right to notice of dishonor must be considered in connection with his request that the cheque should not be presented for several days. Now the important question is, whether the drawer thinks that there will be funds to meet the draft, whether bill or cheque, when it is presented for payment. If I, in London, draw on a bank in York, where I have £1000, which I know will be drawn out to-day, while the cheque cannot be presented till to-morrow, it is idle to say that, knowing there will be no funds there at any time when the cheque can be presented, I am entitled to notice of dishonor. The question therefore is, what was the state of the funds at the time when the bill ought in regular course to have been presented? Then the question arises, what is the meaning of several days or a few days? The jury may well have

thought that it at least postponed the presentment till the 2d of March. Now from March the 2d till the 10th, when the cheque was actually presented, there was not at any time a greater sum than £9 8s. 4d. available for its payment. There was evidence in the accounts to show that the defendant paid in money to his account, but he at once drew out as much as he paid in, or the money was so paid in and dealt with that it was not applicable to the payment of this cheque. This was evidence on which the jury might find that the defendant had not, in fact, funds in the bank at the time when the bill was presented.

But Mr. Sharpe [for the defendant] says, that if there were any funds, the defendant was entitled to notice of dishonor. This cannot be so; the question must be whether, practically, there were funds to such an amount as that at the time of drawing he could reasonably expect payment. For though the expression "any funds" is used in some cases, it is preposterous to suppose that, because there was an old balance of £50 to the credit of a customer, he would thereby be entitled to notice of dishonor of a cheque for £5000. The question then must be, whether there were any such funds as the drawer might reasonably and properly draw against, with an expectation that the draft would be honored. We may read the allegations in the declaration that the defendant had not sufficient, nor any, funds for the payment of the cheque, as meaning that he had no funds adequate for its payment, no funds against which he was entitled to draw the cheque in question. Therefore, as to this first question, I think there was evidence for the jury that there were no such funds in hand, from the time when the defendant would expect the cheque to be presented up to the time when it was presented in fact, as to give him ground to suppose that the cheque would be honored; and I think that this fact was rightly so found. Secondly, it is quite plain that there was evidence for the jury that the defendant had no reason to expect that the cheque would be honored; and I also think that they were right in so finding. There were eight entire days after the time when the defendant might first expect the cheque to be presented, on none of which had he any reason to expect that it would be paid, for he had no right to expect that any cheque would be paid which he had not sufficient effects to meet.

CLEASBY, B. I am also of the same opinion. The issue is distinct, and involves the question whether the defendant had reasonable ground for expecting that the cheque would be paid. That this is a material question appears from *Kemble v. Mills*, 1 M. & G. 757, 761, where, the declaration being objected to, Tindal, C. J., says: "I suppose the objection is, that it is not stated that the defendant had no reason to expect that the bill would be paid;" this shows (though the declaration was in that case held sufficient) that the allegation of want of reasonable ground for the expectation of payment is an im-

portant and a necessary averment, and is therefore an essential matter for consideration. The existence of such reasonable grounds must obviously be a question for the jury. Now, here the cheque was given with a request that it should not be presented for a few days; but it is nevertheless said that if at the time of drawing it there were funds the drawer is entitled to notice of dishonor. But can it be said that after a cheque has been given with such a request, and its drawer next day draws out the whole of his funds, and never afterwards pays in a farthing, nor has any reasonable expectation of funds coming in, so that he must well know that there never can be any funds to meet the cheque, he is not completely aware that the cheque will not be paid in fact? Then put the case of a small sum being paid in, quite insufficient to satisfy the cheque, the question will still be, was there any reasonable expectation that there would be funds to meet the cheque? The jury have found that the defendant had no reasonable expectation that the cheque would be paid, and I think there was sufficient ground for that finding.

CHANNELL, B., delivered a short concurring opinion.

Rule discharged.

KINYON v. STANTON.

Supreme Court of Wisconsin, January, 1878. 44 Wis. 479.

Or by showing that he did not suffer prejudice by the failure to give notice; even in case of loss, he is discharged only to the extent thereof.¹

ACTION against the drawers for the amount of a cheque on the Corn Exchange Bank of Waupun in favor of the plaintiff. The cheque was never presented for payment, and some eight days after it was drawn the bank closed its doors; three weeks later it was adjudged bankrupt. From the time the cheque was drawn until the bank suspended payment the drawers had more than enough money in the bank to meet the cheque. The cheque might have been presented in the interval; and the bank would then have honored it down to the day of closing, even without regard to the state of the defendants' account. Just before, and on the day the bank suspended payment, the defendants, having heard rumors affecting the bank, drew out all their funds, part in favor of themselves, part in favor of another. The defendants some days later refused to pay the cheque. For the sum drawn out by the defendants for themselves an action was afterwards successfully brought by the bank's assignee, in the federal court.

Judgment for the plaintiff for the full sum; defendants appealed.

[Argument not reported.]

¹ N. I. L. § 203.

RYAN, C. J. Doubtless the respondent was guilty of negligence in holding the cheque of the appellants so long without presenting it to the bank for payment. And if the appellants had left funds in the bank to meet it until the failure of the bank, the negligence of the respondent would have discharged the appellants from all liability over. *Jones v. Heiliger*, 36 Wis. 149.

But the appellants saw fit to draw out their entire account in the bank before its failure; and doing so, must be held in good faith to have intended, as they are liable, themselves to protect the cheque which they had given to the respondent. And so the negligence of the respondent did not prejudice the appellants.

This view is not affected by the fact that the bank would probably have paid the cheque, without regard to the state of the appellants' account, at any time before the day of the bank's failure. On that day the bank apparently would not have honored the cheque without funds of the appellants sufficient to meet it. If at any time the bank had paid the cheque without funds of the appellants, they would have been liable to the bank for the amount advanced to pay it. It was immaterial to them whether they should owe the amount to the bank or to the respondent. Certain it is that they must owe it to one or the other. And they elected to owe it to the respondent. As between the parties here the appellants could have escaped liability over only by leaving funds in the bank to meet the cheque, from the day it was given until the failure of the bank. They cannot expect to draw all their funds from the bank before its failure, and then escape liability upon a cheque previously drawn, merely because the bank failed.

It makes no difference in the relation of the parties that the assignee of the bank in bankruptcy afterwards recovered against the appellants the balance which they drew out in favor of themselves on the day of the failure, and in view of it. That recovery went upon what the federal court must have held a fraud upon the bankrupt law. The state law gave them perfect right to do as they did. And the recovery in the federal court, even if the amount had been sufficient to pay the cheque, leaves the fact untouched that the appellants had in fact withdrawn all their funds from the bank, leaving nothing to meet the cheque which they had given to the respondent.¹

By the Court. The judgment of the court below is

Affirmed.

¹ But had the appellants "withdrawn" their funds? Certainly they had not legally done so, as the court held in allowing a recovery by the bank; and that this was under the federal law seems to be immaterial, since that law was as binding on the plaintiff and defendants as was the state law.

BEAUREGARD v. KNOWLTON.

Supreme Court of Massachusetts, May, 1892. 156 Mass. 395.

But reasonable ground to draw does not, necessarily, depend upon the presence of funds in the drawee's hands, even in the case of a cheque.

ACTION by the holder of a cheque against the drawer. The facts appear in the opinion.

[Argument not reported.]

BARKER, J. The action is upon cheques which have never been presented to the bank upon which they were drawn. The only question argued is as to the correctness of the ruling, that, if the facts were as testified to by the president of the bank, the plaintiff was excused from presenting them. The cheques were given for value, and were dated on December 16, 1889, one for the sum of \$250, bearing a pencil memorandum, "Draw Dec. 19th"; one for \$125, bearing a similar memorandum, "Draw Dec. 26th"; and one for \$125, with a memorandum, "Draw Dec. 28th." They were signed by the defendant with the name of J. G. Knowlton & Co., which was the style under which he did business. The president of the bank testified, that on December 16, 1889, and during the remainder of that month and the following January, J. G. Knowlton & Co. had no funds in the bank; but that one M. E. Knowlton had an account at the bank, and the bank had written authority from him to pay cheques signed by J. G. Knowlton & Co., charging the same to the account of M. E. Knowlton, and that, acting upon this authority, the bank had been in the habit of so doing; and that on December 16, 1889, the deposit of M. E. Knowlton was \$51.15; on December 19, \$117.28; on December 26, \$61.13; and on December 28, \$8.18.

We presume that, under ordinary circumstances, the drawer of a cheque is not liable to a suit upon it without presentment to the bank and dishonor. *Kelley v. Brown*, 5 Gray, 108; *Tassell v. Lewis*, 1 *Ld. Raym.* 743; *Cruger v. Armstrong*, 3 *Johns. [Cases]* 5; *Conroy v. Warren*, 3 *Johns. [Cases]* 259; *Murray v. Judah*, 6 *Cowen*, 484, 490; *Little v. Phenix Bank*, 2 *Hill (N. Y.)*, 425; *Case v. Morris*, 31 *Penn. St.* 100, 104; *Purcell v. Allemon*, 22 *Gratt.* 739; *Woodruff v. Plant*, 41 *Conn.* 344, 347; *Foster v. Paulk*, 41 *Maine*, 425. But the cases cited, and many others, hold that a cheque is in the nature of a bill of exchange payable on demand, and that many of the same rules apply to both. *Barnet v. Smith*, 30 *N. H.* 256, 264; *Bickerdike v. Bollman*, 1 *T. R.* 405; *Boehm v. Sterling*, 7 *T. R.* 423, 426. The drawer of a bill of exchange is liable without presentment, if he has no effects in the hands of the drawee, unless the drawee has something equivalent to effects, or has agreed to accept and pay, or the drawer

has some ground for a reasonable expectation that the bill will be accepted and paid. *Kinsley v. Robinson*, 21 Pick. 327, 328, and cases cited; *Commercial Bank v. Hughes*, 17 Wend. 94, 97. The same general principles are applied to cheques; and presentment is excused where the making of the cheque was a fraud upon the part of the drawer, he having no funds in the bank, and no ground for a reasonable expectation that it would be paid. *Byles on Bills* (11th ed.), 216; *Chitty on Bills* (12th Am. ed.), 515; *Franklin v. Vanderpool*, 1 Hall, 78; *Harker v. Anderson*, 21 Wend. 372, 375; *Case v. Morris*, 31 Penn. St. 100, 104; *Sterrett v. Rosencrantz*, 3 Phila. 54; *Hoyt v. Seeley*, 18 Conn. 353, 360; *True v. Thomas*, 16 Maine, 36; *Foster v. Paulk*, 41 Maine, 425, 428; *Terry v. Parker*, 6 A. & E. 502; *Wirth v. Austin*, L. R. 10 C. P. 689.

In this case the drawer had no funds in the bank, and no authority from the bank to draw upon it. One M. E. Knowlton had a deposit account with the bank, and had given it authority to pay and charge to his account cheques signed by J. G. Knowlton & Co., and the bank had been in the habit of so doing. But the deposit of M. E. Knowlton was never sufficient to pay any one of the cheques in suit, and the bank had no authority to allow the account of M. E. Knowlton to be overdrawn by such cheques, and there was no evidence that it had ever pursued such a course; so that the defendant could have had no ground for a reasonable expectation that the cheques would be honored by the bank. When the defendant made them, he knew they would not be paid if presented, as well as though there had been no arrangement as to his cheques between the bank and M. E. Knowlton. Notice of non-payment would have given him no new knowledge. The presentment of either of the cheques would not have entitled the plaintiff to demand from the bank the actual balance to the credit of M. E. Knowlton. *Dana v. Third National Bank*, 13 Allen, 445. So that the facts testified to show affirmatively that no loss happened to the defendant by the omission of presentment.

Exceptions overruled.

CHAPTER VIII.

INDORSER'S CONTRACT.

WHISTLER v. FORSTER.

Common Pleas of England, Easter, 1863. 14 C. B. N. S. 248.

One who purchases a negotiable instrument, *payable to order*, without indorsement, acquires only the rights of his vendor;¹ and if indorsement is made subsequent to the transfer, and after the transferee acquires knowledge of a defence available against his transferor, the transferee is subject to such defence.

ACTION by indorsee against the drawer of a cheque, payable to A. S. Griffiths & Co., or order, and indorsed by the payees to the plaintiff.

The defendant traversed the drawing and indorsement of the cheque, and also pleaded that he was induced to draw it by and through the fraud of Griffiths & Co., and that there never was any value or consideration for the indorsement to the plaintiff or for the plaintiff's holding of it, and that he had notice of the premises before and when the cheque was first indorsed to him, and took the same from Griffiths & Co. with such notice. Issue thereon.

The following facts appeared on the trial: The cheque in question, which bore a 1*d.* stamp, was drawn by the defendant some day before the 3*d* of October, 1862, and handed by him to Griffiths upon an understanding that it was not to be presented for payment until the 4*th*, and an undertaking by Griffiths to furnish the defendant with funds to meet it early on the morning of that day, which, however, he failed to perform. Griffiths on the 3*d* gave the cheque to the plaintiff for value, but did not then indorse it. At the time he received the cheque he had no notice, apart from the want of indorsement to him, of the way in which Griffiths had obtained it from the defendant, but before he obtained the indorsement he had notice of the facts.

On the part of the defendant it was submitted that the plaintiff could not recover upon the cheque, first, because it was post-dated, and, secondly, because before he obtained Griffiths's indorsement he had notice of the fraud practised by Griffiths upon the defendant.

The learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him

¹ N. I. L. § 66.

if the court should be of opinion that the cheque, though post-dated and unstamped (otherwise than with the penny stamp imposed by 21 & 22 Vict. c. 20, § 1), was a valid instrument, and that the plaintiff had a sufficient interest in the cheque to entitle him to sue upon it before he received information of the alleged fraud. Rule *nisi* obtained.

[Argument reported.]

ERLE, C. J. This is an action against the drawer of a bill of exchange; for though in form a cheque, the instrument is for all the purposes of the Stamp Act a bill. The plea is that the bill was obtained from the defendant by one Griffiths by means of fraud, and that it was indorsed to the plaintiff after he had notice of the fraud. The facts are shortly these: The instrument was a negotiable instrument which had been fraudulently obtained from the defendant by Griffiths and had been handed over by Griffiths to the plaintiff in part satisfaction of debt of a larger amount. But Griffiths, at the time he so handed over the bill to the plaintiff, omitted to indorse it. Under these circumstances the condition of things was this, that the plaintiff had at that time the same rights as if an ordinary chattel had passed to him by an equitable assignment; he would have all the rights which Griffiths could convey to him. Now, Griffiths having defrauded the defendant of the bill, he could pass no right by merely handing over the bill to another. According to the law merchant, the title to a negotiable instrument passes by indorsement and delivery. A title so acquired is good against all the world, provided the instrument is taken for value and without notice of any fraud.¹ The plaintiff's title under the equitable assignment here therefore was to be rendered valid by indorsement; but at the time he obtained the indorsement he had notice that the bill had been fraudulently obtained by Griffiths from the defendant and that Griffiths had no right to make the indorsement. Assuming therefore that there may be conflicting equities between the plaintiff and the defendant, I think the right should prevail according to the rule of law, and that the plaintiff had no title as transferee of the bill at all.

Then as to the stamp . . . [Properly stamped.]

WILLES, J. I concur with my lord as to both points. . . . [Properly stamped.]

As to the second point, the general rule of law is undoubted, that no one can transfer a better title than he himself possesses; *nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These, being part of the currency, are subject to the same

¹ Or other equity.

rule as money; and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favor transfers in the ordinary and usual manner whereby a title is acquired according to the law merchant, and not to a transfer which is valid in equity according to the doctrine respecting the assignment of *choses in action*, now indeed recognized and in many instances enforced by courts of law;¹ and it is therefore clear that, in order to acquire the benefit of this rule, the holder of the bill must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud before he does so. Until he does so, he is merely in the position of the assignee of an ordinary *chose in action*, and has no better right than his assignor. When he does so, he is affected by fraud which he knew of before the indorsement.

KEATING, J., delivered a concurring opinion.

Rule discharged.

LANCASTER NATIONAL BANK v. TAYLOR.

Supreme Court of Massachusetts, October, 1898. 100 Mass. 18.

And if the indorsement is not made until after the maturity of the instrument, the holder is charged with notice of all defences available against his transferor, and is subject to them.

ACTION of contract on a promissory note by the holder against the maker. The note was payable to J. S. Butterick or order, and was transferred by him to the plaintiff before maturity, but without indorsement. The indorsement of Butterick was written upon the note after maturity, and while the note was in the hands of the plaintiff. Verdict for the plaintiff and exceptions by the defendant to certain rulings. The facts appear further in the opinion.

[Argument reported.]

FOSTER, J. The rule that the indorsee of a negotiable promissory note, who has taken it before maturity for value and without notice of any want of consideration or other defect rendering it void in its inception, can enforce it against the maker, notwithstanding it was valueless in the hands of the original payee, is founded upon the custom of merchants and the Statute of 3 & 4 Anne, c. 9.² It is an exception to the general rule of the common law; according to which a written promise can be enforced only in the name of the party to whom it is made, and, if it has been assigned, although the assignee is allowed to bring an action upon it in the name of his assignor, yet

¹ Cf. Rev. Laws of Mass. c. 173, § 4.

² *Ante*, p. 15.

he has no greater rights than the assignor possessed, and the instrument remains subject to every defence that would have existed if no assignment had taken place. The ordinary rule applies to all notes which are not negotiable, and to all negotiable notes which are not duly indorsed for value before maturity. A note not negotiable may be assigned and transferred like any other *chose in action*, but can be sued only in the name of the payee, and is liable to every defence existing against him. A negotiable note not transferred until it is overdue may be sued in the name of the indorsee, but as to defences must be treated precisely like one not negotiable. And a negotiable note which is transferred before maturity, but not indorsed until afterwards, in our opinion can stand on no better footing. Whoever receives it takes a contract which upon its face shows that it is subject to every defence that could have been made between the original parties. There is no custom of merchants in favor of such an assignee, and no rule of law by which he is entitled to greater rights than the payee. If the contract was originally invalid for want of consideration or other cause, so will it be in any other hands into which it passes before the legal title is transferred by regular indorsement. No such indorsement having been made before the note is overdue and dishonored, any subsequent one takes effect only from its date. There is no doctrine known to the mercantile law by which it can relate back to the time of the equitable transfer, and place the assignee in the same position as if he had been before maturity the holder of the note for value.

It is true a distinction between negotiable and unnegotiable notes has been recognized in regard to the set-off allowed by statute, and, where a negotiable note was transferred for value before it was dishonored, but not indorsed till afterwards, a previously existing set-off of a distinct demand against the payee was not allowed to prevail. *Ranger v. Cary*, 1 Met. 369. The set-off of distinct demands is a matter regulated by statute, and not a common-law defence. And the court carefully limit the application of their opinion, saying that "here is no question of want or failure of consideration of this note; no offer to prove payment of it; but the defendants rely on an account filed in offset." This case is therefore no authority against the conclusion to which we are conducted by applying the elementary principles of the law merchant.

The facts in the present action show that the defendant intrusted to Butterick his signature to a blank note, with authority to write over it a note of one hundred dollars for the benefit of one Henry; that Butterick fraudulently filled up the note now in suit so as to make it one for the sum of a thousand dollars payable to his own order, and passed it to the Lancaster Bank in payment of a former note, that is, for a valuable consideration. But Butterick did not then indorse the note; and it remained in the hands of the bank unindorsed till

after its maturity. At a later date, when the note was overdue and the bank had notice of all these facts, Butterick did indorse it. Undeniably, if he had done so originally, the defendant would have been liable. Having placed it in the power of Butterick to perpetrate such a fraud, the injury caused by the defendant's own negligence must have been borne by himself, and not by the bank, which was in no fault and guilty of no want of due care. But the defendant is liable only upon and to the extent of the contract which was written, and not for one which might have been but was not made. The bank saw fit to take the note, which purported to be in favor of Butterick, without requiring him to indorse it. They therefore took it subject to any defence which might be made to an action in Butterick's name. And the subsequent indorsement does not improve their position. When the note came into the hands of the bank payable to the order of Butterick, and not indorsed by him, the very form of the instrument gave notice that no one could bring an action upon it except in the name of Butterick, and that it was subject to every defence affecting its original validity which could have been made to it while it continued in his hands.

There is a recent English case in which this identical question has been determined by eminent judges of great experience and authority in mercantile law. . . . *Whistler v. Forster*, 14 C. B. N. s. 248, *ante*, p. 163.

In the opinion of a majority of the court, these citations express with fulness and accuracy the rule, and the limitations of the rule, of the law merchant, which gives to the *bona fide* indorsee for value before maturity of a negotiable instrument a better title and a more complete right of action than the original payee of the instrument may have possessed. The learned judge at the trial having proceeded upon a different view of the law, the

Exceptions are sustained.

RIDER v. TAINTOR.

Supreme Court of Massachusetts, September, 1862. 4 Allen, 356.

No indorsement of an instrument payable to bearer is necessary to pass title according to the law merchant.¹

CONTRACT upon the following promissory note: "\$107. Six months from date, for value received I promise to pay Stephen E. Avery or bearer one hundred and seven dollars with use. Lee, December 1, 1860. Albert J. Taintor." The note bore the following indorsements: "Pay E. A. Bliss, cashier, or order. Warren Newton, cashier."

¹ N. I. L. § 47.

At the trial in the Superior Court, it appeared that the plaintiff had purchased the note in suit before it became due for a full consideration, but the bill of exceptions stated that "there was no evidence that E. A. Bliss, to whom said note had been indorsed, had transferred or indorsed said note to the plaintiff;" or "that the plaintiff had any title in said note from Bliss, or that said note was sued with the knowledge or assent of said Bliss." ROCKWELL, J., ruled that the plaintiff was entitled to recover, and the jury returned a verdict accordingly; and the defendant alleged exceptions.

[Argument not reported.]

BIGELOW, C. J. The contract of the promisor of the note declared on is to pay the sum due on the note at its maturity to the person who shall then be the bearer. The production of the note by the plaintiff is therefore evidence of his title; and, accompanied as it was in the present case with proof that the plaintiff had become the owner of the note by purchase before it became due, established a conclusive right to recover against the defendant.

The indorsement of a third person, directing the payment of the note to be made to the order of another, did not change the contract of the promisor, or enable him to set up in defence that the plaintiff's title was imperfect, merely because he had not obtained the signature of the person to whom some intermediate holder had ordered the note to be paid. *Wilbour v. Turner*, 5 Pick. 526; *Wayman v. Bend*, 1 Camp. 175; *Story on Notes*, § 132.

Exceptions overruled.

BROWN v. THE BUTCHERS' AND DROVERS' BANK.

Supreme Court of New York, May, 1844. 6 Hill, 443.

By the law merchant, the indorsement need not be in the name of the indorser; any substitute therefor, intended as an indorsement, will be given that effect.¹

WRIT of error. Brown, the defendant below, was sued as indorser of a bill of exchange, upon which were the figures "1, 2, 8," in pencil. There was evidence strongly tending to show that the figures were in Brown's hand, and that he intended thereby to bind himself as an indorser; though it was also proved that he could write. The judge charged that if this evidence was believed, the jury must find for the plaintiff. The defendant excepted. Verdict and judgment for the plaintiff.

[Argument not reported.]

¹ N. I. L. §§ 48, 60.

NELSON, C. J. It has been expressly decided that an indorsement written in pencil is sufficient. *Geary v. Physic*, 5 Barn. & Cress. 234; and also that it may be made by a mark. *George v. Surrey*, Mood. & Malk. 516. In a recent case in the King's Bench, it was held that a mark was a good signing within the Statute of Frauds; and the court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference. *Baker v. Denning*, 8 Adol. & Ellis, 94. And see *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, 8 Ves. 54.

These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend it to bind himself.

Judgment affirmed.

TAYLOR v. BINNEY.

Supreme Court of Massachusetts, June, 1811. 7 Mass. 479.

What constitutes indorsement is to be determined by the law merchant; a guaranty written on the back of a negotiable instrument is not indorsement.

THE plaintiff declared upon a promissory note, dated April 26, 1805, subscribed by one Fales, and payable to the defendant or his order in six months with interest; and avers an indorsement and guaranty thereof by the defendant to the plaintiff, and due diligence to collect the same of the promisor, and notice to the defendant of the promisor's failure of payment, etc.

At the trial which was had before SEWALL, J., upon the general issue, the plaintiff gave in evidence the note declared on, and an indorsement¹ made and signed by the defendant in these words: "Dec. 13th, 1805. I guarantee the payment of the within note in eighteen months, provided it cannot be collected of the promisor before that time." There was also another indorsement¹ upon the note in these words: "April 15th, 1806, received one hundred dollars." The plaintiff also gave in evidence an action commenced in his name against the said Fales, upon the note now declared on, by a writ tested January 20, 1807, and served the 28th of the same month; also an execution tested September, 1807, upon a judgment recovered in that suit, and a return upon the execution by a deputy sheriff for the county of Lincoln, dated the 27th of November, 1807, that after diligent search for the body and property of the said Fales, finding neither in his precinct, he returned the execution in no part satisfied.

¹ Indorsement is here used to denote a writing on the back of the paper, not in the technical sense.

The defendant then proved that in April, 1806, the note declared on, with the indorsement thereon, was in the hands of Jacob Thompson, who then commenced an action in his own name upon the said note, against the said Fales, upon which a quarter part of a sloop, of which Fales was master, was attached and holden by Will. Bell, a deputy sheriff, as the property of the said Fales; and that the said Thompson afterwards withdrew the said suit, and relinquished the attachment, upon receiving from the said Fales the sum of \$100, then indorsed upon the said note, which sum was paid by Samuel Hastings, who purchased the said Fales's quarter part of said sloop at the sum of \$400; but upon some difficulty which occurred in the transfer, refused to advance more than a quarter part of the purchase money; and afterwards paid to the seamen belonging to the vessel \$223.40, and to the said Bell the sum of \$23 for expenses and costs of suit. The defendant also proved that the plaintiff was present at the transaction between Thompson and Fales, when the said suit and attachment were relinquished, and immediately received the note of the said Thompson; and there was no evidence of any consideration paid for the note by the plaintiff.

Upon this evidence the judge who sat in the trial, directed a nonsuit, upon the ground, 1st, That the plaintiff had not proved a title in himself to recover upon the said guaranty; and, 2d, If he had proved such title, that the guaranty was discharged, and the defendant no longer liable upon it, after the said suit and attachment were relinquished by the said Thompson, the former holder of the note; especially as the plaintiff was present at that transaction, and fully informed of the state of the note when it came to his hands. The nonsuit was entered, subject to the opinion of the court upon the report of the judge, with liberty to the plaintiff to move for a new trial.

[Argument not reported.]

The action being continued *nisi* for advisement, the opinion of the court was delivered in Suffolk, at an adjournment of the March term in that county, by

SEWALL, J. The plaintiff having been nonsuited, with liberty to move for a new trial, the report of the evidence, upon which the nonsuit was directed, has been considered by the court.

In the argument upon the motion for a new trial two questions have been discussed: whether the plaintiff has entitled himself to an action in his own name, upon the indorsement and guaranty of the defendant? And whether, if so entitled, the defendant is discharged of all responsibility upon his indorsement; considering the conduct of Thompson, the former holder, and of the plaintiff, respecting the collection of this note from Fales, the promisor?

The three justices present at the argument are agreed in deciding for the defendant upon the first question; and a decision of the second question has therefore been thought unnecessary.

It is an established rule, respecting the negotiation of bills of exchange and promissory notes, that a bill or note payable to order is transferable only by indorsement; and what is said of a transfer by delivery, after a blank indorsement, is not inconsistent with this rule but when explained by the usage, is entirely conformable. The usage in this particular is, that after an indorsement in blank by the payee, or any subsequent indorser, it is competent for the holder of the bill or note to make himself the immediate indorsee, and to claim by the blank indorsement. And to maintain an action upon the bill or note, the holder completes the indorsement, by writing an assignment or order of payment to himself over the name of the indorser, which in the usual course of business constitutes a blank indorsement. *Chitty on Bills*, 58, 59, 101, 106, 117; *Doug.* 633, *Peacock v. Rhodes & al.*; 1 *Johns. N. Y. Rep.* 143, *Cock v. Fellows*; 4 *D. & E.* 28, *Mead v. Young*.

In the case at bar, the plaintiff relies on an indorsement which is not blank in the form of it, but completed by the indorser himself. The note, with the words of the payee in his indorsement, are to be construed together as one written instrument. The special guaranty, expressed in that indorsement, is the whole ground, upon which the present action against this defendant can be maintained; and the plaintiff does not rely upon any implied responsibility, resulting from an indorsement in the common form. If this indorsement, in the whole tenor of it, may be construed to be not only a guaranty but also a transfer and assignment of the note, which seems to have been the intention and understanding of the parties, the principal objection to the title of the plaintiff remains in force. There is no name inserted of the party to be entitled by the indorsement; and if this omission might be supplied by extraneous evidence, the facts proved in the case render it certain that the present plaintiff was not the party to the guaranty or assignment when it was made; and no evidence has been offered of any subsequent privity or assent between him and the defendant.

But the argument of the plaintiff is, that the omission of the name of the indorsee is evidence of an intention in the defendant and the other immediate party, whoever he was, to give an unlimited currency to this note, and to accompany it with the collateral promise of the payee, according to the usage and construction in ordinary cases of blank indorsements upon negotiable bills or notes. But in the case at bar there is no necessary implication to this effect, arising from the circumstance of the omission of the name of the indorsee or party to the guaranty. This may have been a mistake or accident. The negotiation was not upon the credit of the original prom-

isor, but wholly upon the final responsibility of the indorser; the ability of the promisor, considering the whole tenor of this indorsement, remaining at his risk; and the assignment seems to be rather a confidence for the collection of the note, than an absolute transfer of the property. The guaranty taken independently of the note is a promise not negotiable, being conditional, and not absolute; and connected with it, the supposition is altogether unreasonable and improbable of an unlimited currency intended for the note itself at the risk of the indorser. *Chitty*, 88; *Com. Dig. title Merchant*, F. 16; 8 *Mod. Rep.* 363, *Morice v. Lee*.

The plaintiff fails therefore in the evidence necessary to his title even admitting the usage cited respecting notes indorsed in blank to have any application where the indorsement is full and restrictive, and not at all in the form of a blank indorsement, unless in the mere circumstance of omitting the name of the indorsee.

The nonsuit is confirmed, and judgment is to be entered upon it for the defendant.

NOTE. — The authorities are in conflict as to the effect of an assignment or guaranty written on the back of a negotiable instrument by the holder, some holding that any writing which purports to transfer title to the instrument is indorsement. See *Adams v. Blethen*, 66 *Me.* 19; *Markey v. Corey*, 108 *Mich.* 184 (cases of assignment); *Partridge v. Davis*, 20 *Vt.* 499 (guaranty). But see *Bigelow, Bills and Notes*, 93, 94.

LEAVITT v. PUTNAM.

Court of Appeals of New York, July, 1850. 3 *Comst.* 494.

A special indorsement is one which specifies the person to whom the instrument is to be payable.¹

A negotiable instrument may be indorsed after maturity.²

THE case is stated in the opinion of the court.

[Argument reported.]

HURLBUT, J. On the 29th day of August, 1844, Messrs. J. W. and R. Leavitt made their note for \$1570.52, payable to the order of T. Putnam & Co. (the defendants), eight months after date. A few days after the maturity of the note, the defendants indorsed it as follows: "Pay the within to A. Thacher, value received, May 21, 1845. T. Putnam & Co." Thacher indorsed without recourse,³ and delivered the note for a valuable consideration to the American Exchange Bank, in whose behalf this action is brought.

¹ N. I. L. § 51.

² *Id.* § 64.

³ *Id.* § 55, of qualified indorsement.

On the trial, the defendants urged, among other grounds of objection to the plaintiff's recovery, that the defendants' indorsement was in effect a new draft payable to Thacher only, and not negotiable, so that no action could be maintained upon it in the name of the plaintiff. In this they were sustained by the court, and the plaintiff was nonsuited.

The other objections taken by the defendants on their motion for a nonsuit were not considered by the court below, and under the circumstances of the case cannot be noticed on this appeal; so that the only thing for us to consider is, whether the indorsement of a note made after due differs from one made before maturity in respect to its negotiability. It was conceded on the argument that no express authority could be found sustaining the distinction upon which the decision of the Superior Court was based; but it was urged that the defence could be sustained upon the principle that a dishonored note loses its mercantile character, and its indorsement becomes an original contract which must be made expressly negotiable in terms, or it could not be held to possess the character of negotiability. There is unquestionably a difference between the indorsement of a note after due and one while it is running to maturity, but this relates only to a single point arising from the necessity of the case; to wit, the time of payment, which, in the latter indorsement, is fixed at a future day by the express agreement of the parties, while in the former it is declared by law to be within a reasonable time, upon demand. But in all other respects the contract is the same as an indorsement in the usual course of trade; and it is difficult to perceive how the single difference referred to can at all affect the negotiability of the indorsement. A bill or note does not lose its negotiable character by being dishonored. If originally negotiable it may still pass from hand to hand *ad infinitum* until paid by the drawer. Moreover, the indorser after maturity writes in the same form, and is bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. Thus the paper preserves its mercantile existence and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument or seems to exist in the case, which warrants the court in treating the ordinary indorsement of a dishonored bill or note as without the law merchant and not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and notice, there was perhaps reason enough to sustain the decision of the court below. But since both the note and its indorsement, by a long course

of decisions, have been treated as within the law merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill, and is equally negotiable. *Edie v. The East India Co.*, 2 Burr. 1216; *Mutford v. Walcot*, 1 Ld. Raym. 574; *Allwood v. Hazelton*, 2 Bailey (S. C.), 457; *Bishop v. Dexter*, 2 Conn. 419; *Berry v. Robinson*, 9 Johns. 121.

The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants' indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words "or order," the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefore was effectual to transfer the note to the plaintiff. *Chitty, Bills*, 136; *Story, Prom. Notes*, § 139.

I am of opinion that the judgment of the Superior Court should be reversed, and a new trial awarded.

Judgment reversed.

WALKER v. MACDONALD.

Court of Exchequer of England, June, 1848. 2 Exch. 526.

A blank indorsement does not specify to whom the instrument is to be payable; its effect is to make the instrument payable to bearer.¹

THIS was an action of debt by the indorsees against the indorser of a bill of exchange, dated the 21st of October, 1846, and drawn by E. Bliss upon, and accepted by J. Williams, for payment to the order of E. Bliss of £86 18s. 4d., four months after date. The declaration stated that E. Bliss indorsed the bill to J. Crowley & Co.; that J. Crowley & Co. indorsed the bill to S. F. Stephens; that S. F. Stephens indorsed it to Bartlett, Perrott, & Co.; that Bartlett, Perrott, & Co. indorsed it to the defendant; and that the defendant indorsed it to the plaintiffs. The defendant pleaded, first, a denial of the indorsement by him to the plaintiffs; secondly, a traverse of presentment for payment; and thirdly, no notice of dishonor.

The cause came on for trial before PARKE, B., at the Middlesex Sittings in Trinity Term, 1847, when a verdict was found for the plaintiffs for the amount of the bill and interest, subject to the opinion of the court upon the following case:

¹ N. L. L. §§ 51, 55.

The plaintiffs produced and read at the trial the bill of exchange mentioned in the pleadings, and which was as follows:

"86l. 18s. 4d.

LONDON, 21st October, 1846.

Four months after date pay to my order eighty-six pounds, eighteen shillings, and fourpence, value received.

(Per pron.)

EDWIN BLISS.

CHAS. JEFFRYS.

To Mr. JOHN WILLIAMS, brushmaker, Cheltenham."

The indorsements were as follows:

"Per proc. Edwin Bliss, Charles Jeffrys; James Crowley & Co.; Samuel F. Stephens; Bartlett, Perrott, & Co.

Pay Messrs. Barker and Walker & Co., or order; W. Macdonald. *Barber and Walker & Co.* Per proc. of the Eastwood Company; Thomas Goodwill. Per proc., Nottingham and Notts Banking Company; Ade. Lasalle, pro manager.

Pay Messrs. Omerod & Hardcastle or order: Elliott & Gragg. Omerod & Hardcastle."

The above indorsement, in the name of "*Barber and Walker & Co.*," was not on the bill prior to or at the time when it was presented for payment, but was written on the bill afterwards, under the circumstances hereinafter stated. The bill of exchange in question was drawn and indorsed as mentioned in the declaration, and was, previously to its being presented for payment as hereinafter mentioned, accepted by the drawee, payable at the London and Westminster Bank. The indorsement by the defendant to the plaintiffs was a special indorsement in the words and figures following: "Pay Messrs. *Barber and Walker & Co.*, or order. W. Macdonald." When the bill became due it was in the hands of Messrs. Jones Lloyd, & Co., bankers, of London, as holders thereof. The bill was presented on their behalf for payment, when due, at the London and Westminster Bank, and payment was refused by such bank, the answer then given by them being "No advice," which is the usual answer when country bills are refused payment, and that answer was given at once, without referring to the indorsements. At the time of such presentment the indorsement "*Barber and Walker & Co.*" was not on the bill, but that indorsement was placed thereon under the circumstances hereinafter stated; all the other indorsements above set out were on the bill at the time of the said presentment. . . . Due notice of dishonor was given to the defendant by the plaintiffs, and in due time. The defendant afterwards sent a letter to the plaintiffs, requesting them to write the indorsement of "*Barber and Walker & Co.*" on the bill. The plaintiffs, after

receipt and in consequence of that letter, wrote the indorsement of "Barber and Walker & Co." on the bill, in the manner in which the same now appears, as stated in this case, and immediately returned the bill to the defendant, who thereupon returned the same to the plaintiffs. The plaintiffs proved that they were the parties constituting the firms of Barber and Walker & Co. and the Eastwood Co., and that Thomas Goodwill, who indorsed for the plaintiffs under the name of the Eastwood Co., was authorized so to indorse. . . .

The question for the opinion of the court is, whether the presentment of the bill, indorsed as above stated, was sufficient as against the defendant, and whether the defendant is liable to the present plaintiffs, under the circumstances in this action. If the court shall be of opinion in the affirmative, the verdict for the plaintiffs is to stand for the amount of the principal and interest until final judgment. If the court shall be of opinion in the negative, a nonsuit is to be entered; and either party, with the consent of the court, is to be at liberty to convert this case into a special verdict.

Cur. adv. vult.

[Argument reported.]

POLLOCK, C. B. This was an action upon a bill of exchange, brought against the defendant, by whom it had been specially indorsed. Before that indorsement the bill had been indorsed in blank, and was therefore payable to bearer. It was decided, in the case of *Smith v. Clarke*, 1 Peake, N. P. C. 295, that when a bill has been so indorsed, and is payable to bearer, no subsequent holder can restrain its negotiability. That decision has always been considered to be a correct one, and has constantly been acted on. In the present case, the bill in question was indorsed to the plaintiffs specially; they indorsed it under another name of the firm, but that name did not correspond with the name in which the bill was indorsed to them. The bill was presented, and the answer was "No advice." Notice of the dishonor of the bill was given to the defendant, and then this action was brought against him. The pleas are, first, a denial of the indorsement. There is no doubt the indorsement, as laid, was proved, and therefore that plea offers no defence. The defence, if any, in truth arises upon the second plea, which is a denial of the presentment of the bill for payment. The question, therefore, is, whether the acceptor was bound to pay the bill upon that presentment; and we are all clearly of opinion that he was so bound. Upon referring to the cases, we find that of *Leonard v. Wilson*, 2 Cr. & M. 589, to be expressly in point. The presentment in the plea, as was stated by my Brother Alderson, in the course of the argument, must be a presentment which will, upon the bill being dishonored, make the defendant liable on his indorse-

ment to the plaintiffs. What, then, is the promise to the plaintiffs? The promise is, that the indorser will pay to the indorsee, and those claiming under him, if the acceptor does not pay to a person entitled to call on him for payment of the bill when due. Here the presentment was by the holder, and the holder was entitled to claim from the acceptor. Upon the authority, therefore, of the case decided in this court, and from the universally received opinion on this matter, we are all of opinion that our judgment must be for the plaintiffs. I may add, that I am not only stating what is the opinion of all the court who heard the arguments, but also that of my Brother Parke, who tried the cause. As we entertain no doubt whatever upon the matter, and as the sum in dispute is so small that it would be absorbed by any further litigation, our judgment will be simply for the plaintiffs, and there will be no special verdict.

Judgment for the plaintiffs.

WHITE v. NATIONAL BANK.

Supreme Court of the United States, October, 1880. 102 U. S. 658.

An indorsement which constitutes the indorsee the agent of the indorser for collection is restrictive, and passes no title as against the indorser.¹

THE case is stated in the opinion.

[Argument not reported.]

Mr. Justice MILLER. This is an action by White, who was plaintiff below, for the sum of \$60,000, against the Miner's National Bank of Georgetown, Colorado. The declaration contains twelve special counts, upon as many drafts, drawn by the Stewart Silver Reducing Company on Thomas W. Phelps, payable in the city of New York to the order of the defendant, and indorsed by J. L. Brownell, its president, to S. V. White, and duly protested for non-payment.

To these counts is added another, in this language: "And for that also, heretofore, to wit, on the first day of April, A. D. 1876, at the said county of Clear Creek, the said defendant was indebted to plaintiff in \$60,000, for so much money by the plaintiff, before that time, paid to the use of said defendant at its request, which said sum of money was to be paid to the plaintiff on request," with an allegation of request and refusal.

To this declaration the defendant pleaded the general issue and several special pleas, which it is unnecessary to notice.

The case was tried by a jury. The plaintiff recovered \$15,000

¹ N. I. L. §§ 53, 54.

The plaintiff relies largely on two propositions to establish his right to recover against defendant on this indorsement.

The first of these is that these words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorser is liable in the usual manner, notwithstanding the words we have quoted.

The other proposition is that such is the custom of bankers who deal in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract.

We are not satisfied that either of these propositions is sound.

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.

If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it.

But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For assuming this to be correct, we think the plaintiff was still entitled to recover more than he did.

The court below seems to have paid but little attention to the issue on the count for money paid to the use of defendant.

It appears distinctly by the evidence, and is uncontradicted, that the money paid by plaintiff on account of these drafts was placed to the credit of the defendant with its corresponding bankers in New York, and paid out on cheques of the defendant, so that there is no question that the latter received the money. There is also no question but that plaintiff thought he was buying these drafts and that they became his property by their delivery to him. It is also evident that Brownell, the president of the bank, thought he was selling him the drafts, and there is evidence that neither White nor Brownell noticed the restrictive words of the indorsement. But if the court below was correct in holding that the indorsement — the evidence in writing of what the parties did — only made White the agent of the bank, and left the bank the owner of the drafts, then both White and Brownell were mistaken, and the money was paid and received

under a mutual mistake. If White paid his money as purchase-money of the drafts, he paid it without any consideration, for he did not purchase the drafts. He only burdened himself with the duty of collecting the money for the bank, and the bank received and used his money without giving him any consideration for it. So, also, if White did not become owner of the drafts, and if, when he should collect the money on them, he would hold it, in the language of the indorsement, "for the account of the bank," the jury might have been left at liberty to presume that the money which he paid was a loan or advance on the security of the paper delivered to him at the time. Either of these views of the transaction would justify a recovery under the money count, in which the delivery of the money and the delivery of the drafts, with the qualified indorsement, would be evidence of the payment and receipt of the money and the circumstances which attended it.

This indorsement is treated by counsel here as an assignment of the paper without recourse, in which the title to the paper passed, but the right to recourse to the assignor was cut off. But this is evidently an error. If the court below was correct, neither the title to the paper nor the right to the money under it passed. The only effect was to justify the acceptor in paying to the indorsee for the account of the bank. The legal effect of the transaction, as evidenced by the writing, was merely to enable White to collect the money for the bank. Though a restricted indorsement, it was no assignment at all. It is not, therefore, a contradiction or a varying of the meaning of the written instrument to prove that, in the delivery of this paper to White, he and the bank were under a mistake as to the effect of it, or that he paid this money to the bank without any consideration, or that he advanced money to the bank in the idea that he was to be reimbursed out of the draft when collected.

The instructions given by the court, and the refusal of the prayer of plaintiff, fairly raised this question. All the drafts, except the three which had no such indorsement, were excluded from the jury. The jury were told that nothing else was before them.

The thirteenth instruction asked by plaintiff and refused by the court distinctly affirmed that if Brownell obtained from plaintiff sums of money on account of the drafts, which the court had refused as evidence, which money was placed to the credit of defendant in a New York bank, and afterwards drawn by defendant, the defendant was liable for such money.

The judgment will be reversed, and the case remanded with directions to set aside the verdict and grant a new trial; and it is

So ordered.

NOTE.— Further as to the effect of an indorsement for collection, see *Freeman's Bank v. National Tube Works*, 151 Mass. 418 and cases cited.

CRIST v. CRIST.

Supreme Court of Indiana, November, 1849. 1 Carter, 570.

When indorsement is necessary to pass title, it must be made by the holder of the legal title to the instrument.¹

THE case is stated in the opinion.

[Argument not reported.]

BLACKFORD, J. This was an action of debt brought by James W. Crist, executor of George W. Crist, deceased, against Christian Crist.

The suit is founded on two sealed notes for the payment of money, executed in December, 1839, by the defendant, and payable to the testator. There are two special pleas, to which replications were filed. The replications were demurred to generally, and judgment was rendered for the plaintiff. It is not deemed necessary to set out the pleadings at length. Taking the allegations in the replications to be true, which we must do, the facts may be considered to be as follows:

In 1836 George W. Crist, being the owner in fee of a certain quarter-section of land, made his will, and devised the east half of said quarter-section to his son, Resin Crist. The defendant afterwards purchased of Resin Crist the interest which the latter claimed in the land under the will, and gave his notes for the price; but there does not appear to have been any written evidence of such purchase. After that purchase, namely, in 1839, George W. Crist, the deviser, sold said east half of said quarter-section of land to the defendant, and conveyed the same to him in fee, receiving in payment from the defendant the notes now sued on, together with a mortgage on the land to secure the purchase money. Resin Crist, who died before his father, left an infant son named William as his heir, who is now living. George W. Crist died on the 27th of March, 1844, without having altered his will, the Revised Statutes of 1843 being then in force.

The grounds relied on to defeat this suit were stated by the defendant's counsel, in their brief, to be as follows: "First, these notes, or the proceeds of the sale, belong to William Crist, the infant son of Resin. Secondly, the action should have been in the name of the infant."

We agree with the defendant that the legacy of the notes and mortgage, if there be such a legacy, did not lapse by the death of Resin Crist in the lifetime of his father. By virtue of the statute the

¹ It follows, as indorsement is necessary where the paper is payable to the order of the decedent, that there must be indorsement by the personal representative to the legatee, the point to be specially illustrated here. See Bigelow, Bills and Notes, 86.

legacy, if any, passed to William Crist, the infant son and heir of Resin, as it would have passed to Resin himself had he survived the testator. R. S. 1843, p. 489, § 23.¹ But whether there is in fact any such legacy is another question. Previously to the Revised Statutes of 1843 the testator's sale and conveyance in fee to the defendant of the land, and his taking of a mortgage on the land to secure the price, after the execution of the will, would have been a revocation of the will as to said land. *Adams v. Winne*, 7 Paige, 97 (1). The defendant contends, however, that this rule is so changed by the 17th sec. of chap. 30 of the R. S. of 1843, that the notes and mortgage in question are now to be considered, under the circumstances of this case, as specifically bequeathed by the will. Whether this position of the defendant is correct or not we shall not stop to inquire. Admitting, for the sake of the argument, that William Crist is the specific legatee of the notes and mortgage, that specific bequest is not sufficient, of itself, to defeat the present action.

It was the executor's duty, by statute, to inventory, among other things, all bonds, mortgages, notes, and other securities for the payment of money. R. S. 1843, p. 515. There is also the following statutory provision: "When any mortgagee of real estate, or any assignee of such mortgagee, shall die without having foreclosed the right of redemption, or recovered payment of the amount secured by such mortgage, the mortgaged premises, and the debt secured thereby, shall be considered as personal assets in the hands of his executor or administrator, and shall be administered and accounted for as such; and such executor or administrator, as such, shall have the same right to possession of the mortgaged premises, and to bring any suit or action respecting the same, or for the recovery of the debt secured thereby, and to execute, discharge, or perform any duty, act, or power contained in such mortgage, or in the provisions of any law, as such mortgagee or assignee could if he were alive." R. S. 1843, p. 572.

There can be no doubt, therefore, but that the notes and mortgage before us, supposed by the defendant to be specifically bequeathed, are part of the personal estate of the testator.

It is well settled that before any legatee of personal property is entitled to his legacy, he must have the assent to it of the executor. The doctrine is thus stated: "The whole personal property of the testator devolves upon his executor. It is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator's having, by the will, directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent

¹ Cf. Rev. Laws of Mass. c. 135, § 21.

to the legacy before his title as legatee can be complete and perfect. Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator by his will expressly direct that he shall do so; for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. It follows from the rule respecting the necessity of the executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him; so, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of the debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it." 2 Williams on Executors, 982, 983.

If the executor refuse his consent to a legacy without cause, the legatee is entitled to relief in equity. 2 Williams on Executors, 984; 1 Roper on Leg. 573; *Elliott v. Elliott*, 9 Mees. & Welsb. 23.

It does not appear in the case before us that any assent was ever expressly given by the executor to the legacy in question; nor are there any facts stated from which an assent can be presumed.

This is a suit by an executor on notes given by the defendant to the testator, the notes being secured by a mortgage on real estate. The defence is, that the notes and mortgage were specifically bequeathed to one William Crist, in whose name the suit should have been brought. We have shown that the notes and mortgage are part of the personal estate of the testator, and that, supposing them to have been specifically bequeathed by him, they cannot be said to be the property of the legatee until the executor shall have consented to the legacy. No such assent being shown, the defence must fail.

A debtor to an estate, where the debt has been specifically bequeathed by the testator, cannot, before the executor has assented to the legacy, say to the latter, "I will not pay you." *Bank of England v. Parsons*, 5 Ves. 665.

Whether, if the executor had assented to the legacy, the suit on the notes should not still be in his name, we have not examined.

Per Curiam. The judgment is

Affirmed with costs.

DALE v. GEAR.

Supreme Court of Connecticut, February, 1871. 38 Conn. 15.

The effect of an indorsement as fixed by the custom of merchants cannot be varied by parol evidence, if no agency, trust, or antecedent equity existed between the parties¹ [e. g. the defendant cannot show that it was agreed that a blank indorsement was to be without recourse].

ASSUMPSIT by the holder against the indorser in blank of a promissory note. Plea, that in consideration of the defendant's agreement "to indorse said note in blank, and to omit prefixing the words 'without recourse' to his said indorsement, they, the said plaintiffs, by parol, then and there promised and agreed that they never would have recourse to the said defendant upon said note or upon said indorsement." Demurrer to the plea, and case reserved thereon for the Supreme Court.

[Argument not reported.]

BUTLER, C. J. We have given this case the consideration which, as involving an important commercial question, it has seemed to require, and are of opinion that the plea cannot be sustained on principle or by authority.

First, it is not sustainable on principle.

The rule that parol evidence is not admissible to contradict or vary a written contract is founded in the highest principles of public policy, and there is no class of contracts to which it should be more inflexibly applied than to those connected with bills of exchange and promissory notes. Nor is there any one of the varied and special contracts, so connected, in respect to which the application of the rule is more important than the contract of warranty implied by law from the blank indorsement of a negotiable note by the payee before maturity. It is absolutely essential to the negotiability of such a note that the rule to which we have alluded should be applied to it; and it has always been so applied when the note has been negotiated to a second indorsee and an effort has been made to prove some contemporaneous parol agreement in bar.

But it has sometimes been claimed, and is claimed in support of the plea in this case, that notwithstanding the rule is so applied in favor of a *bona fide* holder to whom the note has been negotiated, yet as between the indorser and indorsee, the original parties to the contract of indorsement, the rule should not be applied. But the answer must be, that the contract of indorsement is implied by law as clearly and perfectly from the blank indorsement of a negotiable note, irre-

¹ Cf. *White v. National Bank*, *ante*, p. 177.

spective of any contingency of negotiation, as if written out in full when indorsed. And if, as between the original parties, there is any equity existing *dehors* the instrument, which should prevent the indorsee from enforcing the contract, it must be set up *as an equity* provable in equity, to bar an apparent legal liability; and cannot be shown because the rule of evidence to which we have alluded is not applicable.¹ The rule is as applicable to such parties as to others, and the true theory is, that the relation or antecedent agreement out of which the equity arises may be shown between them, and proof of it does not necessarily contradict the contract.

There are four classes of cases in which, as exceptional cases, and as between the original parties, indorser and indorsee, any relation, antecedent agreement, or state of facts from which a controlling equity arises, may be pleaded and proved by parol in bar of an action on the warranty. Thus, the relation of principal and agent may be shown, for the agent takes no title or warranty from the indorser, but holds as agent. So, secondly, it may be shown that the note was indorsed to the holder for some special purpose, and is holden in trust, as where it is indorsed and delivered for collection merely. *Lawrence v. Stonington Bank*, 6 Conn. 521, is an example of this class of cases in our own reports. In like manner, thirdly, the relation of principal and surety may be shown, and that the indorsement was made at the request and for the accommodation of the immediate indorsee; for the equity of the relation forbids the enforcement of the contract. Such was *Case v. Spaulding*, 24 Conn. 578. So, fourthly, it may be shown that there was an equity arising from an antecedent transaction, including an agreement that the note should be taken in sole reliance on the responsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce it is a fraud. Such was *Downer v. Cheseborough*, 36 Conn. 39. The exceptions illustrate the rule. But this plea shows no agency, trust, equitable relation, or equity connected with an antecedent transaction constituting a consideration for the agreement, or which would justify a court of equity in interfering to prevent an enforcement of the contract of warranty which the law implies. It presents a naked case of an attempt to prove by parol that a clear and unambiguous contract of warranty is not such, and to contradict it in terms, — to turn an indorsement without restriction, before maturity, into a restricted indorsement. Such a plea cannot be sustained without a violation of essential principles.

Nor is the plea supported by any well-considered and unquestioned authority.

The defendant claims, in the first place, that it is supported by the

¹ That is, the equity may be shown, not upon any ground that the rule against parol evidence is not applicable, but upon grounds of its own.

decisions of this State, and he relies on a class of cases where the action was upon a non-negotiable note, or a negotiable note indorsed by one not a party to it, which by our law stands on the same ground. But those decisions cannot sustain him. That class of blank indorsements is not controlled by commercial usage, and does not import an absolute contract of warranty. The contract presumed by law from them is presumed *prima facie* only, and differs in different States. In this State such indorsements are not only *prima facie* but conditional; that is, that the note shall be collected of the maker by due diligence. In Massachusetts and New York such an indorsement is treated as absolute guaranty,¹ or the indorser charged as a joint promisor.² In all, the presumption is treated as one of fact rather than one of law, and the real contract made between the parties, if a special one, may be written over the signature of the indorser.³ It is otherwise in a note like this. There are then broad lines of distinction between the two classes of indorsements, and the defendant's plea is not supported by the class of decisions referred to.

The defendant also relies on *Case v. Spaulding*, 24 Conn. 578, but it does not sustain him. There the defendant was not the payee, and as second indorser was not liable to the payees of the note, for they as first indorsers were bound to pay it. The defendant also indorsed at the request of the plaintiff as surety, for his accommodation, and was within one of the classes of equitable exceptions, where the relation on which the equity rests may be shown. The dictum of Judge Ellsworth, confined within the limits called for by the case, was undoubtedly true; but the defendant does not bring himself within the exception.

The defendant further relies on *Downer v. Cheseborough*, 36 Conn. 39, but he is not sustained by that case. It was not put to us as a case where the antecedent contract which created an equity between the parties could not be shown under our law, if the contract had been made here, in connection with the agreement claimed, to show that the plaintiff was attempting to perpetrate a fraud, but as a case where, by the laws of New York, where the contract was made, it could not be proved by parol. The case turned solely on the question whether the law of evidence of the forum or of the *lex loci contractus* should govern. In that aspect only we considered and decided it, and that question alone is discussed in the opinion. If the questions which are raised here had been raised there, we should have holden without hesitation, first, that the indorsement of a negotiable note before maturity by the payee creates an absolute warranty to the immediate as well as all subsequent indorsees that the instrument and the antecedent signatures thereon are genuine; that the indorser has

¹ As to the rule in New York, see *ante*, p. 78.

² The rule in Massachusetts. See *ante*, p. 73.

³ That is not true in Massachusetts. See *Wright v. Morse*, 9 Gray, 337.

title to the instrument, and is competent to bind himself by the indorsement; and that the maker will pay it on due presentment when it is due; but that, if he does not, the indorser will pay it if due notice is given him of such dishonor; and, secondly, that no special agreement — as that the unrestricted indorsement was intended or agreed to be a restricted one — can be given by parol evidence, except in the class of cases adverted to where an equitable relation existed between the parties in respect to the indorsement when it was made, which rendered the enforcement of the contract inequitable and fraudulent. Equity overrides all rights, and suspends the operation of all legal rules between original parties when necessary to prevent a fraudulent use of them; and therefore the exceptions mentioned have been recognized and applied at law. *Downer v. Cheseborough* was clearly within one of the exceptions, but this case is not.

The defendant under his second point cites three cases from Pennsylvania to show that the contract set up in the plea was provable there by parol. In examining those cases we think the law of Pennsylvania is otherwise. The first case cited is that of *Hill v. Ely*, 5 Serg. & Rawle, 363. The marginal note sustains his claim, but the case does not. In that case it appears that the defendant purchased coffee of the plaintiff upon an express agreement that the plaintiff should receive in full payment the notes of one Jabez Lamb, without the responsibility of the defendant. The notes were payable to the order of the defendant, and were handed to the plaintiff, pursuant to agreement, without indorsement. The plaintiff then said to the defendant, "Hill, you must indorse those notes;" to which Hill replied, "That is not our understanding." The plaintiff rejoined, "They are made payable to you; how will you convey them to me? You must indorse them, in order that I may collect them." Hill then said, "I indorse them; but remember, I am not to be held responsible for their payment."

The case was put to the court by the distinguished counsel engaged solely on the ground that the attempt of Hill [Ely] to charge Ely [Hill] upon his indorsement was a fraud, and the court so held. They say: "The evidence offered went to prove a direct fraud in obtaining the indorsements or their perversion to a use never intended, — a fraudulent purpose." The court further say that parol or extrinsic evidence would be received in chancery to reach such a fraud, and therefore would be received in their courts at law; that the relief in equity would be grounded, not upon the admissibility of parol evidence as between such parties to contradict the writing, but to show extrinsic facts raising an equity *dehors* the instrument, to prevent the fraudulent purpose. The court also say that the evidence was admissible to show a *trust* between Hill and Ely for the purpose of collecting the notes and applying the proceeds in payment for the

coffee. They recognize the leading case of *Hoare v. Graham*, 3 Camp. 57, as law, but distinguish it because in *Hoare v. Graham* there was no allegation of fraud. The case is on all fours with *Downer v. Cheseborough*. In both there was an antecedent contract which raised an equity *dehors* the instrument, which made the attempt to enforce the contract implied by law from the indorsement a fraudulent one relievable in equity. It is implied in both decisions that in a case like this, where no equity existed, such a contract could not be shown by parol.

Hill v. Ely was not overruled or shaken by the subsequent cases cited. *Patterson v. Todd*, 18 Penn. St. 426, was the case of a negotiable note, but it was indorsed by the payee when *overdue*, and there was no subsequent demand and notice. The main question in the case was whether such a demand should have been made upon the maker and notice given to the indorser. It was held that the indorsement was equivalent to drawing a new bill, and that demand should have been made in a reasonable time and notice given of the dishonor. The court also held that under the circumstances of that case the defendant might show by parol evidence that he said he would not warrant the notes. But the court did not question the authority of *Hill v. Ely*, nor does it appear that it has ever been questioned. The remaining case cited from Pennsylvania was the case of a non-negotiable note. It has no bearing upon this case.

The defendant under his third point cites a case from Massachusetts, and dicta from Judge Shaw.¹ But the note in that case was not negotiable, and the case and dicta are unimportant. The defendant also cites one English case — that of *Pike v. Street, Moody & Malkin*, 227 — in support of his claim. It is sufficient to say of that case that it is not directly upon the point, is contrary to the present current of English decisions, and was questioned in the recent case of *Foster v. Jolly*, 1 Crompt. Mees. & R. 703.

These are all the decisions cited by the defendant; and there is not one of them directly in point which can be relied upon as authority. On the other hand, the current of decisions in England is directly against the admission of such evidence. *Hoare v. Graham*, 3 Camp. 57; *Goupy v. Hardy*, 7 Taunt. 159; *Free v. Hawkins*, 8 Taunt. 92. And the adverse decisions in this country, which are directly in point, are quite numerous. *Bank of Albion v. Smith*, 27 Barb. 489; *Thompson v. Ketcham*, 8 Johns. 146; *Patterson v. Hull*, 9 Cowen, 747; *Payne v. Ladue*, 1 Hill, 116; *Hall v. Newcombe*, 7 Hill, 416; *Odam v. Beard*, 1 Blackf. 191; *Fuller v. McDonald*, 8 Greenl. 213; *Crocker v. Gretchel*, 23 Me. 392; *Wilson v. Black*, 6 Blackf. 509; *Barry v. Morse*, 3 N. H. 132.

¹ *Riley v. Gerrish*, 9 Cush. 104.

The Superior Court¹ must therefore be advised that the plea is insufficient.

NOTE. — Some of the authorities admit parol evidence to vary a *blank* indorsement, on the ground that, the contract being implied, the parol evidence rule is not violated. But does the parol evidence apply in such a case? The contract is one of custom, i. e. of the law merchant, which has a well-defined method by which an indorser may exempt himself from liability. See Bigelow, Bills and Notes, 104 and note; *Ross v. Espy*, 66 Penn. St. 481.

LITTAUER v. GOLDMAN.

Court of Appeals of New York, February, 1878. 72 N. Y. 506.

One who negotiates a negotiable instrument by delivery only, impliedly warrants to the transferee that he has title, and that the instrument is genuine; and, further, that he has no knowledge of any fact which would impair its validity.²

ACTION for breach of warranty by a transferee against the transferor of a negotiable promissory note. The plaintiff alleged that the defendant sold to him the note in question, without indorsing it, for a valuable consideration; that the note was void, and that he had not been able to collect it from the maker. There was no allegation that the defendant expressly warranted that the note was valid, or that the defendant knew that it was void, when he sold it to the plaintiff. Demurrer; overruled, and the defendant appealed.

[Argument reported.]

MILLER, J. The right of the plaintiff to maintain this action rests upon the ground that the note in question which was sold and transferred by the defendant to the plaintiff was invalid and void, by reason of its original usurious consideration. It is alleged that, being in violation of the statute against usury, it was no note, and by implication of law the defendant did warrant and undertake that the same was not usurious or illegal, but a valid and legal note. The complaint does not allege that the defendant had any knowledge of the usury or was a party to the same, but states that the seller by the act of transfer for a valuable consideration, impliedly warranted that the paper was genuine and all that it purports to be upon its face, and incurred an obligation by the sale to make the paper good, although he did not indorse or guaranty the same. The question whether an action will lie for the loss sustained by the plaintiff by reason of the note being usurious, and the recovery of the amount thereof thereby defeated, has never arisen under the precise circum-

¹ A slip for Court of Common Pleas.

² N. I. L. § 82.

stances presented in this case, and demands an examination of the principle applicable to the contract entered into upon the sale of paper of this description, and of the authorities bearing upon the subject. The rule is well settled that generally one who transfers paper by delivery only, incurs none of the liabilities which attach to an indorser, for the reason that the irresistible inference is, that if he transfers it and it is received without his indorsement, such liabilities did not enter into the bargain or the intention of the parties. This rule, however, is not without exception, and the transferor of notes or bills by delivery warrants the genuineness of the signatures, and that the title is what it purports to be. If the paper is forged the transferor is liable upon the original consideration which has never been extinguished by the sale. 2 Parsons on Contracts, 37, 38. So, also, it is laid down by the same author that the vendor without indorsement warrants that the paper is of the kind and description that it purports to be, and there is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability, and the assignment of a bill or a note for a valuable consideration raises an implied warranty that the assignor has done nothing, and will do nothing to prevent the assignee from collecting it. The reason given as to forged paper is that it is nothing, and the one who has transferred it has transferred nothing, and is therefore liable. 2 Parsons on Contracts, 39, 40. The question whether paper tainted with usury, which is transferred by the holder without knowledge of this defect, can be regarded as within the principle of the exceptions stated, is not free from difficulty, and at first view there appears to be some ground for claiming that a note made in violation of a statute which declares usury to be a misdemeanor, and that all paper of this kind shall be void, should stand on the same footing as forged or other paper, which is excepted from the general rule.

Although the reported cases do not decide the exact point, an examination of some of the leading authorities tends to throw some light on the subject. In *Marvin, Prest. of the Delaware Bank, v. Jarvis*, 20 N. Y. 226, a note was transferred to the plaintiff which had been taken at a usurious premium by the defendant, and the avails received by him. Upon being sued the defence of usury was interposed, which was successful, and the bank sued the defendant to recover the amount and costs of prosecuting the note. It was held that one who transfers a *chose in action* impliedly warrants that there is no legal defence to its collection arising out of his own connection with its origin, and that the party accepting the transfer is at liberty to act upon the implied assertion of the validity of the paper, and to bring an action for its collection; and when defeated, to recover the costs incurred by him from his assignor. The opinion lays down the rule that the authorities hold the doctrine in

general terms that the vendee of a *chose in action*, in the absence of express stipulations, impliedly warrants its legal soundness and validity, and that exceptions do not exist when the invalidity of the debt or security sold arises out of the vendor's dealing in relation to it. It is also said that the act of transferring the note was the strongest possible assertion that no legal defence existed. The defendant in the case cited had knowledge of the usury, which was not the fact here, and hence it differs from the case at bar, and is not decisive of the question; but the opinion is very strong in upholding the general doctrine referred to where there is a radical defect in the note.

In the cases of *Whitney v. National Bank of Potsdam*, 45 N. Y. 305, and *Bell v. Dagg*, 60 N. Y. 530, the notes were forged, and the implied warranty related to the genuineness of the signature, which, as we have seen, is expressly provided for in the elementary works. In the case of *Gemport v. Bartlett*, 75 Eng. C. L. R. 849, an unstamped bill of exchange, indorsed in blank purporting to be a foreign bill, was sold without recourse by the holder. It was shown to have been drawn in the country where the parties resided, and was for that reason unavailable for want of a stamp; and it was held that the article did not answer the description of that which was sold, viz., a foreign bill, and hence the purchaser could recover back the price from the vendor. This case sustains the doctrine that the money might be recovered as paid under a mistake of fact, which seems to have been a mutual mistake, and the whole case appears to have been disposed of upon the ground that the article did not answer the description. There is some analogy between the case last cited and the one at bar, for here the note on its face purported to be valid, and was only shown not to be by proof of extrinsic facts, which affected the original consideration. The difference, however, is that in the case last cited the purchaser contracted for a foreign bill which required no stamp, and did not receive what he was entitled to, while here there was a secret defect unknown to both parties, and not provided for; and as was said by the Lord Chief Justice in *Gemport v. Bartlett*: "If it really had been a foreign bill, any secret defect would have been at the risk of the purchaser." From the authorities to which we have adverted, it appears that in every case where usury was involved there was knowledge of its existence on the part of the person who held and transferred the note. It is true that in *Dela-ware Bank v. Jarvis*, *supra*, it is remarked by the judge that he does not consider it a material circumstance that the defendant had knowledge that the note had not been negotiated prior to the time when it was received, and, as we have seen, lays down the broad rule that in any case where there is not an express agreement, the vendor of a *chose in action* warrants not only the title, but the soundness and validity of the note. The opinion of the learned judge is entitled to

great respect; but, as the facts show it was not necessary to go to this extent to sustain the decision made, it is not entirely controlling.

It is of grave importance whether a *scienter* is material for the purpose of upholding an implied warranty in a case of this kind. In *Hoe v. Sanborn*, 21 N. Y. 552, Selden, J., lays down the rule, "that whenever an article sold has some latent defect, which is known to the seller, and not to the purchaser, the former is liable for this defect if he fails to discover his knowledge on the subject at the time of the sale." He proceeds to state that where knowledge is proved by direct evidence, the responsibility rests upon the ground of fraud; but where the probability of knowledge is so strong that courts will presume its existence without proof, the vendor is held responsible upon an implied warranty; and the difference between the two cases is, that in the one the *scienter* is actually proved; in the other it is presumed. A *scienter* is, therefore, essential to establish an implied warranty; and, as we have seen, the cases to which we have referred all show knowledge on the part of the vendor. The cases which are cited to sustain the doctrine that the *scienter* is immaterial where there is a warranty either express or implied do not go to that extent. . . .

It is true that some of the cases to which we have referred, hold that express representations are not necessary to establish a case and fix a liability, but in all of those where the notes were affected by usury the evidence showed that such fact was known to the defendant. The case of a forged instrument, as we have seen, rests upon a different principle, viz., that the note is no note, and hence none of the cases cited aid the plaintiff. The doctrine that an action can be maintained to recover back the purchase-price paid under a contract of sale of personal property, without proof of warranty or fraud, where, upon delivery of the property, it proves utterly valueless, and where an offer to return has been made and refused, which is held in *Stone v. Frost*, 61 N. Y. 614, is scarcely applicable to negotiable paper, which must be governed by entirely a different rule. In the latter case, where the transfer is made without indorsement, it is not unreasonable to suppose that certain liabilities did not enter into the consideration of the transfer, and had it been so intended some agreement would have been made in regard to the same. . . .

The examination we have made of the question shows that the law in regard to the transfer of negotiable bills of exchange and promissory notes, as laid down for a century or more, only excepts two cases as coming within the doctrine of an implied warranty, viz., a warranty of title, and that the instrument is genuine and not forged.¹ There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, there

¹ Cf. N. I. L. § 82, 3, "That all prior parties had capacity to contract."

is an implied warranty of the validity of the note. To uphold such a doctrine would be an innovation upon a settled principle of law, and the establishing of a new and different rule from that which has governed the sale and transfer of this species of property for a long period of time. It is at least exceedingly doubtful whether it would be expedient to inaugurate a new and questionable rule of conduct for the government of transactions of this description, even if the law permitted it to be done. The hardship which may fall upon the plaintiff by the purchase of the paper in question may operate quite as harshly on the defendant, as the assumption is that he had no knowledge of the inherent vice which affected the note. It is difficult to apply the rules of law in all cases with exact justice. In fact, if the rule be as the authorities hold, and as should be if it is not well understood, that the purchaser of paper of this description takes it at his own hazard and risk without any warranty, unless he chooses to require such an indemnity, and makes it a part of the contract, no serious inconvenience or injury can follow. The doctrine of *caveat emptor* applies, and the fault is with the person who fails to exact a warranty, if it turns out that he has been mistaken or has unfortunately made an unprofitable or a bad bargain. Neither party has any just ground of complaint in such a case.

The result is that the judgment was wrong and must be reversed, with leave to the plaintiff to amend his complaint upon the usual terms in such cases.

All concur except EARL, J., dissenting.

Judgment accordingly.

NOTE. — The decision in this case has been sharply criticised. In *Meyer v. Richards*, 163 U. S. 385, Mr. Justice White, in an elaborate opinion, reviewing the cases, said: "There is an exceptional case (*Littauer v. Goldman*, 72 N. Y. 506), which holds that the common-law obligation, as to the implied warranty of the identity of the thing sold, in the case of commercial paper extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper, differing from all others; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion in this case illustrates the same contradictory position presented here by the argument for the defendant in error, to which we have just called attention, that is, that it admits the common-law rule, and then denies its essential result by eliminating conditions of non-existence which are necessarily embraced by it. . . . Either the principle of warranty of identity must be accepted or rejected; it cannot be accepted and its legitimate and inevitable results denied. The rule there announced was in conflict with previous decisions in New York, and the decision is strongly criticised by the Court of Errors and Appeals of New Jersey in *Wood v. Sheldon*, 42 N. J. L. 421, 425."

When the defect goes to the title of the transferor or to the genuineness or existence of the thing sold, the common-law rule of implied warranty is applied. In *Hannum v. Richardson*, 48 Vt. 508, the plaintiff brought an action of

assumpsit for breach of warranty. The facts were that the defendant had indorsed, without recourse to the plaintiff, a note which had been given for intoxicating liquor, and which was void by statute. In affirming a judgment for the plaintiff, the court said, per Pierpont, C. J.: "By indorsing the note 'without recourse,' the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that in respect to such liability it may perhaps be regarded as standing without indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled, that where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time; and in such case knowledge on the part of the seller is not necessary to his liability. The implied warranty is, in this respect, like an express warranty, the *scienter* need not be alleged or proved. . . . In this case the note in question was given for intoxicating liquors sold in this State in violation of law, and therefore was void at its inception; ¹ in short, it was not a note, it was not what it purported to be, or what it was sold or purchased for. . . . In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand."

But it seems that there is a peculiar warranty in the sale of a commercial instrument, to wit, that the vendor has no knowledge of any facts which would render the instrument valueless; e. g. that the makers of a promissory note were insolvent at the time of the sale. *Hecht v. Batcheller*, 147 Mass. 335; *Brown v. Montgomery*, 20 N. Y. 287; N. I. L. § 82, 4.

The Statute is not clear upon the question whether knowledge must be proved in such a case as *Littauer v. Goldman*, *supra*. Section 82, subdiv. 1, provides that the transferor by delivery or by qualified indorsement warrants that the instrument is "what it purports to be;" while subdiv. 4 says that he warrants "that he *has no knowledge* of any fact which would impair the validity of the instrument or render it valueless." The difficulty arises from the different construction put by the courts upon secret defects rendering an instrument void. In *Littauer v. Goldman*, the court held that the note was what was purported to be sold, but that a "secret defect" rendered it invalid and void; while in *Meyer v. Richards*, *supra*, in which case bonds, rendered void by the constitution of the State, were sold, the court held that the thing transferred was not the thing which was bargained for; and this construction was put upon *Littauer v. Goldman* by the court. See also *Hannum v. Richardson*, *supra*, in which it was held that the note was not what it purported to be, though the defect was a "secret" one.

"The error in the theory adopted by the Court of Appeals of New York, we think, is this: It likens the unknown illegality of the paper sold, to a latent defect in an article sold to which the doctrine of *caveat emptor* applies. The analogy does not hold. Unknown insolvency of a party to the instrument is the correlative to the defect in an article sold — a latent vice affecting its quality and value. But when the instrument is null and void — in fact, no instrument at all in legal existence — it does not respond to the description which its face imports. It is the mere semblance of a bill or note, not one in truth — and no one can acquire any legal title to it. We speak, of course, of those instruments which are void by statute in all hands whatever. . . . Forged paper is void; and any paper so denounced as void by statute is

¹ Statutes in many States save the rights of *bona fide* purchasers.

equally so." Daniel on Negotiable Instruments, 15th ed., pp. 714, 715. It has been declared that § 82, subdiv. 4, codifies the rule in *Littauer v. Goldman*. Prof. James Barr Ames, in Vol. 14, Harv. Law Review, 241, 252; but *quære*, whether this is necessarily so. It seems that whether it is or not will depend upon the construction which the court puts upon the fact which renders the instrument invalid; if that of *Meyers v. Richards*, *supra*, then the case will fall within subdiv. 1; if that of *Littauer v. Goldman*, then the case will come within subdiv. 4. That is to say, the court will have to determine what constitutes a secret defect, within the meaning of this rule of warranty.

In theory, it seems that if the instrument never had any existence as a legal obligation, no knowledge on the part of the transferor need be proved to make a case of liability; if, however, the instrument existed, according to its purport, but there was some fact, such as a failure of consideration, payment, or other equity, which was available against the transferee, for example, where the transfer took place after maturity, then, to recover, the plaintiff must prove that the defendant had knowledge of the fact, and the case falls within subdiv. 4.

There is a second peculiarity in regard to warranty, touching the law of bills and notes, in that, by the Statute, the warranty of indorsement runs to remote *bona fide* holders, making it, so far, negotiable. N. I. L. §§ 82, 83.

THE STATE BANK v. FEARING.

Supreme Court of Massachusetts, March, 1835. 16 Pick. 533.

An indorser without qualification admits, as an incident of his indorsement, that the signatures of prior parties are genuine.¹

ASSUMPSIT on a promissory note for the sum of \$2000, dated April 15, 1833, payable to the order of Thomas Jackson, junior, in six months, made by Charles Brown, and indorsed with the names of the payee and of the defendant.

By an agreed statement of facts, it appeared that the signatures of Brown and the defendant were genuine, but that the defendant could prove, if such evidence was admissible, that the indorsement of the name of the payee was a forgery; that the note was presented by Brown to the plaintiffs for discount, in the usual course of business, and discounted by them for him; that, at the time of such discount, the plaintiffs and the defendant were ignorant of the forgery; and that due notice of the non-payment of the note was given to Brown, Jackson, and the defendant.

If upon this statement of facts the court should be of opinion that the plaintiffs were entitled to judgment, the defendant was to be defaulted; otherwise, the plaintiffs were to be nonsuited.

[Argument not reported.]

¹ Cf. N. I. L. § 79.

SHAW, C. J. The peculiar features of this action are, that the plaintiffs claim of the second indorser, from whom they immediately took the note. The question is, whether the forgery of the indorsement of the name of a prior party is a good defence to the note; and the court are of opinion that it is not.

In general it is not necessary for the holder to prove the signature of any party prior to the party whom he sues. The reason seems to be obvious, that the party defendant, by his indorsement, has admitted the ability and the signature of all prior parties. Bayley on Bills, 313; Critchlow v. Parry, 2 Camp. 182. The effect of the engagement of the indorser is, that if the prior parties do not pay the note according to its tenor upon due presentment, upon notice to him he will. It is therefore a rule upon this subject, that a plaintiff is under no obligation to prove the signature of those prior to the party intended to be charged. It is very different where he claims against the acceptor of a bill or maker of a note. They respectively promise to pay to the payee or his order, and until he has made such order by his indorsement the plaintiff can establish no title, and, to prove such order, he must prove the genuineness of his signature. Smith v. Chester, 1 T. R. 654; Lambert v. Pack, 1 Salk. 127. So an acceptor is bound, though the bill be forged. Jengs v. Fowler, 2 Strange, 946.

The circumstance that this bill was offered for discount by Brown makes no difference; the plaintiffs had a right to look to their immediate indorser, and if satisfied to take the note on his credit, he is liable to them; and it was for him to see that he has a good remedy over against those who purport to be prior parties.

Defendant defaulted.

ERWIN v. DOWNS.

Court of Appeals of New York, June, 1857. 15 N. Y. 575.

And that prior parties had capacity to contract. The tendency of the late American authorities has been to speak of this as a contract or warranty.¹

ACTION upon two accommodation promissory notes jointly made by the same persons, each note payable to the defendant, and indorsed by him. The plaintiff took them for value before maturity. Defence, that the makers were married women when they signed the notes, and incompetent to contract, and that the plaintiff knew the fact when he took the notes. There had been due demand and notice of dishonor. Judgment for the plaintiff on report of referee; the defendant appealed.

[Argument not reported.]

¹ See Bigelow, Bills and Notes, pp. 98, 99 and note. It should be observed that the action in these cases is upon the instrument, on the indorser's conditional promise to pay.

SHANKLAND, J. The note was void, as against the makers, because they were married women, and incapable of contracting obligations in that form.¹ But when the defendant indorsed the note, he impliedly contracted that the makers were competent to contract, and had legally contracted, the obligation of joint makers of the note. He also assumed the legal obligation, in most respects, of the drawers of a bill. The fact, known to the plaintiff at the time he took the note, that the makers were married women, did not deprive him of the character of a *bona fide* purchaser; nor does the payee's knowledge that the drawee is a married woman discharge the drawer in case of non-payment of the bill by the drawee; nor is the indorser discharged, though the name of the maker is forged. 1 Comst. 113. The fact is not found that the plaintiff was aware the note was accommodation paper. The plaintiff was a *bona fide* purchaser within the law merchant. Neither the complaint nor the finding of the referee tells us who transferred the notes to the plaintiff. The legal presumption is, that he received them from some legal holder in due course of business.

Judgment affirmed.

WARREN-SCHARF ASPHALT PAVING COMPANY v.
COMMERCIAL NATIONAL BANK.

Circuit Court of Appeals of the United States, October, 1899. 97 Fed. R. 181.

And it has been held that an indorser without qualification incurs a distinct liability in implied warranty, apart from his conditional engagement to pay the instrument; for example, if prior signatures are forged.²

ACTION on an implied warranty, by the indorsee against the indorser of a cheque.

The Warren-Scharf Company, having places of business in New York and Detroit, was a depositor in the Commercial National Bank of Detroit, and was accustomed to make deposits and draw cheques through one England, its attorney and cashier.

A certificate of England's authority had been sent by the company to the bank, which certificate was as follows:

"OFFICE OF WARREN-SCHARF ASPHALT PAVING COMPANY,
81 Fulton Street.

NEW YORK, July 8, 1897. No. 243.

To the Commercial National Bank of the City of Detroit, State of Michigan: This certifies that C. R. England is officially author-

¹ See Rev. Laws of Mass. ch. 153, § 2, to the effect that a married woman may contract as if sole, except that she may not contract with her husband.

² This apparently is the rule of the Statute. See N. I. L. § 83, 1 and 2.

ized to indorse and sign cheques and deposit moneys and make drafts on this company in the name and for the use of this company, in and through the Commercial National Bank of the City of Detroit, State of Michigan, until this power of attorney shall have been officially cancelled, but not longer than during the year 1897. . . . The said bank account to be kept in the name of this company, and all cheques drawn against or indorsed for deposit to said account by the said C. R. England to be in the name of this company."

This certificate was signed by the company by its treasurer and president.

Cheques drawn by the company on its New York bank, payable to its own order, had, on several occasions, been indorsed by England as attorney and cashier for the company, and had been deposited in the Commercial Bank, and the bank had always credited the company with the amount of such cheques, and had allowed the company to draw against the balance so created.

On August 7, 1897, the following cheque was presented to the bank for deposit by England, and the amount placed to the credit of the bank:

"No. H 2, 985.

NEW YORK, Aug. 5, 1897.

WARREN-SCHARF ASPHALT PAVING COMPANY.

Pay to the order of Warren-Scharf Asphalt Paving Company ten thousand & $\frac{00}{100}$ dollars (\$10,000.00).

JAS. D. LAWRENCE, *Attorney and Cashier.*

To the NATIONAL CITY BANK, New York."

Indorsement:

"Pay to order of Commercial National Bank, Detroit, Michigan.

WARREN-SCHARF ASPHALT PAVING COMPANY,

By C. R. ENGLAND, *Atty. & Cashier.*"

On the same day, the bank paid to England \$10,000, on a cheque of the company, drawn payable to the order of cash, and duly signed by England in the usual manner. Apart from the cheque of August 5, *supra*, there were not sufficient funds on deposit to pay this cheque.

The signature of Jas. D. Lawrence, on the cheque of August 5, had been forged by England, who had disappeared with the money drawn by him on August 7. This action is to recover back the \$10,000 paid to England. The judge in the lower court instructed the jury to find a verdict for the plaintiff, and the defendant brought this writ of error.

[Argument not reported.]

LURTON, Circuit Judge. . . .

The authority expressly conferred upon England included the power to "indorse and sign cheques." The evidence shows that remittances were several times made to him from the New York office of the company by cheques payable to its own order. To utilize them, an indorsement was essential. An indorsement of a cheque purporting to be payable to the order of the paving company, for the purpose of either collection or deposit, implied a contract that the instrument itself and all antecedent indorsements were genuine. Story, *Prom. Notes*, §§ 135-380, 387; 4 *Am. & Eng. Encyc. Law* (2d ed.), 447; *Harris v. Bradley*, 7 *Yerg.* 310; *Turnbull v. Bowyer*, 40 *N. Y.* 456-460; *Onondaga County Sav. Bank v. U. S.*, 26 *U. S. App.* 377, 12 *C. C. A.* 407, and 64 *Fed.* 703. In the absence of circumstances amounting to notice that the signature of the paving company was a forgery, the defendant in error had a right to rely upon the indorsement made by England as a representation and guaranty by the payee that the cheque itself, as well as the signature of the drawer, was genuine. Although the defendant in error was bound at its peril to know the signature of a cheque drawn by England under the power of attorney to him, yet it was not the payee of this forged cheque; and it was not bound to know the New York signature of the paving company, or the genuineness of the filling up of a cheque purporting to have been drawn at the principal office of the corporation upon its New York bank of deposit. Unless, therefore, it acted in bad faith, or the forgery was so obvious that it should have been detected by bare inspection, it was not negligent in accepting the cheque as a cash deposit in reliance upon the representation of the known local agent of the apparent drawer, and upon the contract implied from the indorsement placed thereon by England under his known authority. *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 *N. Y.* 211-215.

Neither in the form or signature of the cheque, nor in any circumstance occurring when the cheque was indorsed and deposited, do we find any fact which would justify a jury in holding the defendant in error guilty of any negligence in taking this forged cheque and crediting it as a cash deposit. The instrument turned out to have been unauthorized by the apparent drawer, and the signature a forgery. If the drawer and payee were not legally identical with the indorsee, the fact that the instrument was not genuine, and the drawer's signature a forgery, would operate to fix the liability of the indorser as absolute, without either demand or notice. In such a case the indorsee would become entitled to recover the amount of the cheque from the indorser upon the implied warranty that the instrument and the antecedent signatures were genuine. Liability would be fixed before and without any presentation of such a forged cheque. *Turnbull v. Bowyer*, 40 *N. Y.* 456-460. The fact that the

drawer, payee, and indorser were legally the same person does not change the principle. The indorsement of this cheque by the paving company, or by one authorized to indorse in its name, was equally effective as a warranty of the genuineness of both the instrument itself and all antecedent signatures. The liability of the paving company growing out of its relation to the instrument as an indorser was, by reason of the fact that the instrument was a forgery, not the usual contingent liability of an indorser, but one of fixed responsibility as a warrantor of the genuineness of the paper indorsed.

But it is said that the authority to England did not authorize him to overcheque, and that, until the cheque deposited had been actually collected, there was no authority to pay the \$10,000 cheque presented on the same day. The forged cheque was the apparent cheque of a responsible customer upon another bank. According to the well-recognized course of banking business, this cheque was accepted as a cash deposit. *Morse, Banks*, §§ 569, 570. The receiving teller testifies that in the acceptance of this cheque, and crediting it at once to the account of the paving company, there was nothing out of the ordinary course of banking business. This evidence is not contradicted or questioned. The bank was under no obligation to credit a cheque thus deposited as cash, but it was clearly guilty of no negligent or unusual conduct in doing so. When received and credited as cash, the account was subject to cheque, and the bank had no right to refuse to pay cheques against the account thus swollen. *Armstrong v. Bank*, 133 U. S. 433-466, 10 Sup. Ct. 450. The cheque subsequently paid was in no true sense an overdraft, and the bank became the *bona fide* holder of the forged cheque for value so soon as cheques were drawn and paid by reason of the credit thus obtained.

It is urged that the cheque drawn by and paid to England on August 7 was not a cheque drawn in the name of the paving company. The authority of England was to "indorse and sign cheques;" "all cheques drawn against or indorsed for deposit to said account by the said England to be in the name of this company." It is said that the \$10,000 cheque paid to England was signed only in the name of "C. R. England, Atty. & Cashier." This is a misreading of the instrument. The name of the "Warren-Scharf Asphalt Paving Company" appears on the face of the cheque above the signature of England. It is true that the name of the company appears above the words "Pay to the order of cash." This cheque was in the form of all previous cheques drawn against this account. The name of the paving company is engraved or printed on the cheque, and was taken from the cheque book furnished England by the company. It is likewise the form in which the company's name was signed upon cheques drawn at its principal office against its New York account. The objection is not well taken.

.

There was no error in instructing the jury to find for the defendant in error, as there was no such conflict of evidence as would properly make an issue for the jury. The judgment is accordingly affirmed.

NOTE. — Cf. *Blethen v. Lovering*, 66 Me. 437, that the warranty is broken as soon as made, and that the Statute of Limitation begins to run from the time of the transfer, that is, as to the right of action for breach of warranty.

TOWNSEND v. BUSH.

Supreme Court of Connecticut, November, 1814. 1 Conn. 260.

But a party to a negotiable instrument, who is divested of interest, is competent to prove the invalidity of the paper.

ASSUMPSIT against Bush as acceptor of a bill of exchange drawn by Ebenezer and Atwater Townsend, and payable to the plaintiffs or order. There was also a count for money paid, laid out, and expended for the defendant's use. Defence, usury. To prove this, the defendant offered the individuals composing the firm of E. & A. Townsend as witnesses; offering also, at the same time, to show that they had no interest in this suit, being discharged from all liability on the bill under an act of insolvency in the State of New York. The plaintiffs objected on the ground that said parties were drawers of the bill. The court excluded the witnesses, and directed the jury to find a verdict for the plaintiffs; which being accordingly done, the defendant moved for a new trial. The motion was reserved for the consideration of all the judges.

[Argument reported.]

TRUMBULL, J. The principal question in this case is, whether Ebenezer and Atwater Townsend, the drawers of the bill in question, are admissible witnesses in an action by the plaintiffs as payees of the bill against the defendant as acceptor, to prove that it was executed on an usurious contract, and therefore is void in law.

The rule that no person can be permitted to give testimony to invalidate any instrument to which he has made himself a party by affixing his signature, in cases wherein he has no interest in the event of the suit on trial, was first adopted in the case of *Walton v. Shelley*, 1 Durn. & East, 296, by Lord Mansfield, and the other judges of the King's Bench. He states that "the rule is founded in public policy; that there is a sound reason for it, because every man who is a party to an instrument gives a credit [to] it; that it is

of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it; that it is emphatically right in case of notes, because, in consequence of different statutes, two very hard cases have arisen: first, with respect to a gaming note, which, though in possession of a *bona fide* purchaser without notice is void;¹ and, in the case of usury, a note given for a usurious consideration, though in the hands of a fair indorsee, is equally void; and therefore, whenever a man signs these instruments, he is always understood to say that to his knowledge there is no legal objection to them whatever." He then quotes the maxim of the civil law, *nemo suam allegans turpitudinem est audiendus*, and applies it as conclusive on the present point. The other judges concurred, and established this as a general rule of law.

The English courts soon found the principle was laid down on too broad a scale, and narrowed it in its application to negotiable instruments only. No new or additional reasons were ever adduced in its support. It was adhered to on the grounds stated by Lord Mansfield, and the authority of the decision in that case. But, at length, the rule was exploded in the King's Bench, and such a witness determined to be admissible, unless interested in the event of the suit on trial. See *Jordaine v. Lashbrooke*, 7 Durn. & East, 601.

As the decisions of the highest court and ablest judges at Westminster Hall have been thus directly contradictory, and as their principle (notwithstanding the dicta of several of the judges in *Allen v. Holkins*, 1 Day's Cases in Error, p. 17, adopting the rule as sound law, and the decision in *Webb v. Danforth*, p. 301, denying its application as to facts subsequent to the execution of the instrument) has never till now come directly in question before the highest courts in this State, it is our duty to decide it according to the general rules and principles of law respecting admissibility of testimony; and if the grounds and reasons in *Walton v. Shelley* are found to be fallacious, we cannot consider the case and its authority conclusive.

The first ground Lord Mansfield takes is, that every person who signs an instrument thereby gives it a credit, and can never be admitted to dispute its validity. Before we adopt this principle of universal exclusion and estoppel, we must inquire what credit each several party, by putting his signature upon a negotiable instrument, thereby gives to it, and what obligation he thereby incurs; for each signer stands on a different ground.

The drawer of a bill or negotiable note acknowledges himself in-

¹ Statutes in this country, very generally, make bills or notes given for a gaming consideration void, except as to *bona fide* purchasers. See Rev. Laws, Mass., ch. 99, § 3.

debted to the payee to the amount of the sum it contains, and engages to pay the damages, in case the bill shall be dishonored, or the note uncollected, without the fault of the payee or of those to whom it may be indorsed. The indorser of a bill or note acknowledges his receipt of a valuable consideration, and contracts to pay the sum, in case it cannot be obtained of the drawer. The acceptor acknowledges it to be duly drawn; he is not admitted to deny the handwriting of the drawer; and he contracts to pay the sum according to its contents to the legal holder.

These are the rules and principles of common law as adopted and sanctioned by the courts in this State.

The indorsee or holder of a negotiable security has nothing to do with the transaction between the original parties. See *Jordaine v. Lashbrooke*. Nor has the drawer or acceptor anything more to do with the contracts between subsequent indorsers and indorsees. Each party is bound only so far as his own obligation extends, and cannot be precluded from denying any fact not acknowledged by his signature. All these contracts are separate and independent.

He warrants nothing further with respect to the validity of the draft, he hangs out no false colors, and is not estopped by his signature from testifying to any facts respecting the instrument, or any legal objections within his knowledge.

The maxim of the civil law, that no man is to be heard who alleges his own turpitude or crime, was never by any court or judge, before Lord Mansfield, applied to the inadmissibility of a witness, but only to the rights of the parties in a suit or action. No suitor can support a claim in which the ground or consideration is an unlawful act of his own; nor can any defendant be heard on a defence grounded on his own unlawful act. But an accomplice in a crime, a fraud, or any illegal transaction, was always an admissible witness, unless immediately interested in the suit. I may further observe that the term "turpitude" can with no propriety be applied to an act not *malum in se*, but only *malum prohibitum* by force of some statute, making it penal in some particular country or jurisdiction.

In *Jordaine v. Lashbrooke*, Lord Kenyon says: "The rule contended for is this: Whatever fraud may have been committed, if the party to the fraud can get on the instrument the name of the person who may be the only witness to the transaction, he will stand entrenched within the forms of law, and impose silence on that only witness, though he be a person of unimpeachable character, and not interested in the cause." This he denies to be law. Grose, Justice, says: "Let the plaintiff in this case resort to his indorser to recover back the consideration he gave for the bill."

Indeed, if a man sell and indorse a note executed by an infant,

or *feme covert*, and void at common law, or void by statute as being usurious, unstamped, or a forgery, I see no legal defence he can set up against an action of *assumpsit* by the indorsee for the money paid on a consideration which has wholly failed. For that is not an action on the bill or note, but rests entirely on the ground that the note is void in law. If such an action can be supported, there is no hardship in the case of an innocent purchaser; he has his remedy. If in any case he is deprived of every legal remedy, no court can have a right, in compassion to the hardship of his situation, to assist him in evading the law by excluding such witnesses or evidence as are admissible in all other cases.

The hardship upon the innocent indorsee, which seems so strongly to have influenced the mind of Lord Mansfield, is indeed no more than this: by the statutes to which he refers, all bills or notes, where the consideration is money lent on usury or for gaming, are declared void to all intents and purposes whatever; and, consequently, the indorsee, whenever he brings his suit on the note or bill itself against the drawer, promisor, or acceptor, must fail of a recovery in that action. But he is not without remedy; for, if a fair and *bona fide* purchaser without notice, he may recover of the indorser on his indorsement. *Bowyer v. Bampton*, 2 Stra. 1155.

In the case of *Lowe and others v. Waller*, Doug. 736, in which all the former cases are well considered, Lord Mansfield himself says: "It is better that the law should be as it is with respect to bills and notes than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover on the bill." I am therefore of opinion that the witnesses offered are admissible, notwithstanding they have put their signature upon the bill.¹

SMITH and SWIFT, JJ., delivered concurring opinions.

¹ See *contra*, *Churchill v. Suter*, 4 Mass. 156; *Thayer v. Crossman*, 1 Met. 416. The Massachusetts court makes an exception to the rule, excluding the party as a witness, to wit, when the plaintiff took the instrument with notice of the invalidity. *Thayer v. Crossman*, *supra*. See *Bigelow, Bills and Notes*, 101, 102 and note.

[The indorser's conditional engagement is that, if upon presentment and demand upon the party bound or directed to pay, the instrument is dishonored, and due proceedings on dishonor are taken, he will pay the amount of the instrument to the holder.¹]

MUSSON v. LAKE.

Supreme Court of the United States, December, 1845. 4 How. 262.

There must be a presentment² of the instrument as well as a demand of payment.³

THE case is stated in the opinion of the court.

[Argument not reported.]

McKINLEY, J. The plaintiffs brought an action of *assumpsit*, in the Circuit Court of the United States for the Southern District of Mississippi, against the defendant, as indorser of a bill of exchange, drawn at Vicksburg, in said State, by Steele, Jenkins, & Co., for \$6,133, payable twelve months after the first day of February, 1837, to R. H. and J. H. Crump, and addressed to Kirkman, Rosser, & Co., at New Orleans, and by them afterwards accepted, and indorsed by the payees and the defendant.

On the trial of the cause, the plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the reading of which the defendant objected; because it did not appear in the protest that the notary had presented the bill to the acceptors, or either of them, when he demanded payment thereof. And upon the question, whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed in opinion: which division of opinion they ordered to be certified to this court; and upon that certificate the question is now before us for determination.

The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill. A presentment to and demand

¹ N. I. L. § 83.

² Id. § 91.

³ While this is the point particularly to be illustrated, the student should carefully observe the requisites and effect of the certificate of protest, as discussed in the opinion.

of payment must be made of the acceptor personally, at his place of business or his dwelling. Story, Bills, § 325. Bankruptcy, insolvency, or even the death of the acceptor will not excuse the neglect to make due presentment; and in the latter case it should be made to the personal representatives of the deceased. Chitty, Bills, 7th London ed., 246, 247; Story, Bills, 360; 5 Taunt. 30; 12 Wend. 439; 2 Douglass, 515; Warrington v. Furber, 8 East, 242, 245; Esdaile v. Sowerby, 11 East, 117; 14 East, 500.

The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and, thirdly, that he may obtain immediate possession of the bill upon paying the amount. And the acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill upon paying it, to be used as a voucher in the settlement of accounts with the drawer. Story, Bills, § 361; Hansard v. Robinson, 7 Barn. & C. 90.

Mr. Justice Story has given the form of a protest now in use in England, in his treatise on Bills of Exchange, by which it will be seen that the words "did exhibit said bill" are used, and a blank is left to be filled up with "the presentment, and to whom made, and the reason, if assigned, for non-payment." Story, Bills, 302, note. This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand of payment, and the answer of the drawee or acceptor. The holder of the bill is the proper person to make the presentment of it for payment or acceptance. Story, Bills, § 360. But the law makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser. Everything, therefore, that he does in the performance of this duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is *ex parte*; and the evidence contained in the protest is credited in all foreign courts. Chitty, Bills, 215; Rogers v. Stevens, 2 T. R. 713; Brough v. Parkings, 2 Ld. Raym. 993; Orr v. Maginnis, 7 East, 359; Chesmer v. Noyes, 4 Camp. 129. The evidence contained in the protest must, therefore, stand or fall upon its own merits. It rests upon the same footing with parol evidence; and, if it fails to make full proof of due diligence on the part of the plaintiff, it must be rejected.

But the counsel for the plaintiffs insists that the statute of Louisiana and the interpretation given to it by the Supreme Court of that State in the case of Nott's Executor v. Beard, 16 La. 308, have so changed the law merchant as to render unnecessary the present-

ment of a foreign bill for payment. After a careful examination of the opinion of the court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection, that court said it might perhaps have been more specific, if, in the protest, it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled, that, before the holder of an accepted bill can call on the drawer for payment he must make a presentment for, or demand of payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient.

To support this proposition, they refer to Chitty on Bills, and Bayley on Bills, and the annotators on them. And as further proof and illustration, and to show that demand of payment should be preferred to presentment for payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word "demand" is used in it, and that the word "presentment" is not; and they refer to the statute, also to show that notaries were vested with certain powers by it, which gave authority to their acts; and that they being public officers, the presumption of law is, that they do their duty; and therefore, if the protest were defective, and liable to the objection urged against it, this presumption of law would cover all such defects. This is substituting presumption for proof, in violation of all the rules of evidence.

With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law; and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or indorser, must present it to the acceptor and demand payment thereof. It may be well here to repeat what Lord Tenterden, C. J., said on this subject, in delivering the judgment of the Court of King's Bench, in the case of *Hansard v. Robinson*, before referred to. He said: "The general rule of the English law does not allow a suit by the assignee of a *chose in action*. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has

a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto*, in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" This extract, we think, furnishes a full answer to all that has been said by the Supreme Court of Louisiana to prove that it is not necessary to present the bill to the acceptor for payment; and to the presumption of law relied on to cure the defects in the protest.

But to show that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand, we proceed to examine its provisions. The principal object of the legislature in passing this statute seems to have been to give authority to notaries to give notices, in all cases of protested bills and promissory notes; and to make their certificates evidence of such notices.¹ And, therefore, all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in these words: "That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand; and by certificate, added to such protest, to state the manner in which any notices of protest to drawers, indorsers, or other persons interested were served or forwarded; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated."

It seems to have been taken for granted by the legislature that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices; and when done, according to the statute, a certified copy of the protest and certificate should be evidence, not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Loui-

¹ Cf. Rev. Laws of Mass. ch. 73, § 13.

siana. But, independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes, as fully as it does the demand of payment. In giving construction to the act, the phrase, "and of the manner and circumstances of such demand," cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor; and so important is this part of the proceeding, that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded. The legislature cannot be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and indorsers to their liabilities. It is but reasonable, therefore, to give to the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the legislature. This, we think, may fairly be done without doing any violence to the intention or the language of the statute.

The manner of the demand must, therefore, mean the presentment of the bill for either acceptance or payment; and the circumstances of the demand, we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear, that bills payable at sight, and after sight, are within the meaning of the statute; because it provides for a demand of payment of the acceptor of a bill. Now, how can there be an acceptor of a bill, without a presentment for acceptance? Until the bill become due, payment cannot be demanded of the drawee. This shows that, without the word "presentment" and the word "demand" also, the plain meaning of the statute could not be carried into effect. A bill payable at a fixed period after its date need not be presented for acceptance:¹ it is sufficient to present it and demand payment when it arrives at maturity; but a bill payable at sight, or after sight, can never become due until after it has been accepted.² How is the holder or the notary to obtain the acceptance of such a bill, under the decision of the Supreme Court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due; then it must be admitted that, by fair and necessary construction, the word "presentment" is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor

¹ N. I. L. § 160.

² *Id.*

the decision of the Supreme Court of Louisiana has changed the law merchant in any of these respects.

There is, however, another question, entirely independent of the statute and the decision of the Supreme Court of Louisiana, which may be decisive of the case before this court; and that question is, whether the contract between the holder and indorser of the bill in controversy is to be governed by the law of Louisiana, where the bill was payable; or by the law of Mississippi, where it was drawn and indorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and indorsers resided in Mississippi; the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter State. Story, Bills, § 366; 4 Peters, 123; 2 Kent, Comm. 459; 13 Mass. 4; 12 Wend. 439; Story, Bills, § 76; 4 Johns. 119; 12 Johns. 142; 5 East, 124; 3 Mass. 81; 3 Cowen, 154; 1 Cowen, 107; 5 Cranch, 298.

Whatever, therefore, may have been the intention of the legislature in passing the statute, and of the Supreme Court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi, the custom of merchants has been adopted as part of the common law; and by that law and their statute law this case must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury, ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor as evidence of the dishonor of the bill; which is ordered to be certified to the Circuit Court accordingly.

NOTE. — McLean and Woodbury, JJ., dissented as to the effect of the protest, regarding it as sufficient evidence of presentment. They agreed with the majority as to the *necessity* of presentment, the chief point to be illustrated here.

FREEMAN v. BOYNTON.

Supreme Court of Massachusetts, June, 1811. 7 Mass. 483.

To make a proper presentment and demand, the holder must have the instrument in his possession, if it is not lost or destroyed.¹

THIS was an action of *assumpsit*, brought by the plaintiffs as indorsees of a promissory note, dated at Boston, September 4, 1806, by which one Joseph Boynton promised the defendant to pay him or his order \$902.16 in nine months from the date, with interest after six months, and which the defendant indorsed to the plaintiffs.

On *non assumpsit* pleaded, the cause was tried before THATCHER, J., at the last September term in this county. At the trial, neither the making nor the indorsement of the note was denied; the whole question being whether the plaintiffs had used due diligence in demanding payment of the promisor, and in giving notice to the indorser, so as to make him liable.

On this point the evidence was, that on the 9th or 10th of June, 1807, a copy of the note, with a protest made by a notary public at Boston, was transmitted to Mr. Merrill, an attorney of this court, living at Wiscasset, who immediately called on the promisor, and demanded payment, which was refused; but he gave no notice at that time to the defendant, the indorser. On the 3d of July following, Mr. Merrill, having then with him the original note, again called on the promisor, and demanded payment, which was refused; and on the same day he went to the house of the defendant, the indorser (both promisor and indorser being inhabitants of Wiscasset), and informed the defendant's wife of the non-payment of the note by the promisor; and he also left a letter at the house, directed to the defendant, and giving him the same information; the defendant then being, and having been for several months at sea.

A verdict was taken by consent, for the plaintiffs, subject to the opinion of the court upon the above facts reported by the judge who sat at the trial. If, upon these facts, the court should be of opinion that the plaintiffs are entitled by law to maintain their action, they were to have judgment on the verdict; otherwise the verdict was to be set aside, and they were to become nonsuit.

[Argument reported.]

PARKER, J. The question submitted to the court in this case is whether the plaintiffs have made use of due diligence, in demanding payment of the promisor, and in giving notice to the indorser, so as to make him liable. (Here the judge recited the facts from the report of the trial, and proceeded:)

¹ Cf. N. I. L. § 177, providing that where a bill of exchange is lost or destroyed, protest may be made on a copy.

The demand made by Mr. Merrill, on the 9th or 10th of June, was seasonable; for, as the holders of the note lived in Boston, and the promisor and indorser at Wiscasset, a distance of near two hundred miles, a reasonable time should be allowed, after the note became due, to transmit it, the indorsees having a right to wait for payment to them in Boston, before they were obliged to follow the maker to his home, to make the demand.

But this demand was ineffectual for two reasons: 1. Because Merrill had not the note with him, to deliver it up on receiving payment; and, 2. Because no notice was given to the indorser of the refusal to pay.

Whenever a demand of payment is made, the person making the demand should have with him the evidence of the debt; for otherwise the debtor may well refuse to pay, on the ground that he has a right to have his obligation or contract, or to see it cancelled, when he is called upon to discharge it. And this rule will especially apply to negotiable securities, which may be legally transferred to another, at the very time the original payee makes his demand of payment.

This rule may admit of exceptions; as where the security may be lost; in which case a tender of sufficient indemnity would make the demand valid, without producing the security; and where, from the usual course of business, of which the parties are conusant, the security may be lodged in some bank, whose officers shall demand payment and give notice to the indorser, according to the custom of such banks; the security not being presented at the time of the demand, but the parties being presumed to know where it may be found.

There is nothing in this case, whereby an exception to the general rule can be created. But had this demand been sufficient, still it would not affect the indorser, he having had no notice whatever, that it had been made.

The objection to the demand, on the ground that Mr. Merrill had not a letter of attorney from the indorsees, would not have prevailed. A letter, or even a verbal request, from the holders of the note being sufficient to authorize him to make the demand, if he had held the note, and been able to deliver it up on receipt of its contents.

Then the question is, whether the demand made by Merrill, with the original note in his hand, on the 3d of July, 1807, which wanted but one day of being a month after the note became due, and of which, and of the refusal to pay, immediate notice was given to the indorser, in the best manner circumstances would admit of, he being absent at sea, was within a reasonable time, so as to charge the indorser? And we are all of opinion that it was not; there being no sufficient excuse given for so long a delay, a regular mail being established between Wiscasset and Boston, by which letters may be safely transmitted in a time not exceeding three days.

Even if the mistake of the plaintiffs, in not sending down the note

when they directed the first demand, or of Merrill in neglecting at that time to notify the indorser, should have authorized a subsequent demand, in order to charge the indorser, yet no reason whatever can be furnished for suffering twenty-five days to elapse between the two demands. It is important to the interests of the community, that the law, which requires diligence in the holder of securities, to enable him to exact payment, from one who is only conditionally liable, should be strictly enforced.

But the plaintiffs have further relied upon a supposed demand made by a notary at a house in Boston, where the promisor had once boarded. This was altogether nugatory, it appearing from the report that both promisor and indorser lived at Wiscasset; and it not appearing that the promisor had any place of business in Boston, or that the note was payable there. And even if any weight could possibly be attached to this kind of demand, it could not avail against the indorser, for he had no notice of it.

We are all, therefore, of opinion that the verdict must be set aside, and the plaintiffs become nonsuit.

TAYLOR v. SNYDER.

Supreme Court of New York, May, 1846. 3 Denio, 145.

The place of date of a promissory note, payable generally, is only *prima facie* the place of payment; if the maker is known to reside elsewhere, presentment must be made accordingly, as where, at the execution of the note, he was known by the holder to reside in another State. Presentment should be made at the place of business or residence.¹

ASSUMPSIT against the indorser of a promissory note, payable generally, but dated at Troy, New York, at which place presentment for payment was made, the maker being a resident of Florida. The plaintiff was nonsuited. Motion for new trial. The facts appear in the opinion.

[Argument not reported.]

BEARDSLEY, J. As the note bears date at Troy, it is presumed to have been made at that place, although the maker then resided in Florida, as was well known to the original holder, Morris, and to Stevenson, to whom it was subsequently transferred. The residence of the maker had not been changed when the note fell due, his domicile still being in Florida.

The indorser resided in Troy. It was not shown that he ever

¹ N. I. L. § 90.

owned the note, or was under any other obligation for its payment than that of an ordinary indorser; and it may fairly be inferred from the case that the note was given for a debt due from the maker to Morris, and was indorsed for his benefit at the request of the maker.

Some months before the note fell due, the indorser had been asked by the then holder, Morris, if it would be paid at maturity, to which he replied that it would be; that his brother, the maker, would send the money to him, and he should see the note was paid. But on being requested to stipulate, absolutely, to pay the note himself, he declined to do so. It does not appear that on this or any other occasion anything was said as to the place where payment would be made, or where the note should be presented for payment at maturity.

Upon the evidence as stated in the case, I think it cannot be said that anything has been done by the indorser to change or affect his original liability or his rights, in that character. He had not designated any particular place in Troy, or that city at large, as the place at which the note would be paid, or where demand should be made, nor had he been requested to designate any place for that purpose. And although he certainly gave a strong assurance that the maker would remit the money to him, and therefore that the note would be duly paid, he at the same time refused to bind himself absolutely for its payment. He chose to leave his own responsibility where his contract and the law had placed it; and no one had a right to understand from what he said that he intended to assume any new obligation, or to dispense with the performance of any act which the law required the holder of the note to perform. It does not appear to have been suggested on the trial that the action was to be sustained on any such ground, nor was the judge requested to submit the question of a waiver of demand of payment, by the indorser, to the jury. It was doubtless then urged, as it was on the argument at bar, that this note was by law payable at Troy, and therefore the defendant had been duly charged as indorser, and not that he had in any manner waived a demand at the proper place.

What, then, is this case? A debtor, whose residence is in Florida, being at Troy, makes a note, which he dates at that place, to his creditor, a resident of this State, for an amount due to him, and procures a friend residing at Troy to indorse the same. No place of payment is specified in the note, nor is there anything to indicate a place, unless that follows from the note bearing date at Troy. The holder knows the residence of the maker to be in Florida, but when the note falls due, instead of making demand of the maker personally, or at his residence or place of business in Florida, payment is demanded at Troy and not elsewhere. Was this a sufficient demand as respects the indorser? It clearly was, if the note was by law payable at that place, and it as clearly was not, if the note was payable elsewhere. This is the only question to be determined.

The date of a note at a particular place does not make that the place of payment, or at which payment should be demanded for the purpose of charging the indorser. This was expressly adjudged in the case of *Anderson v. Drake*, 14 Johns. 114. That was an action against the indorser of a promissory note, bearing date in the city of New York, but not made payable at any particular place. When the note was made, the maker lived in New York; but before it fell due he removed to Kingston in the county of Ulster. The counsel for the plaintiff insisted "that as the note was dated in New York, and the parties resided there at the time it was made, it must be presumed, no particular place being designated for the payment, that it was payable in New York; that the removal of the maker from New York to any other place did not render it necessary for the holder to follow him for the purpose of demanding payment." But the court thought otherwise, and held that a demand of the maker personally, or at his residence or place of business in Kingston, as in ordinary cases, was necessary, and that the indorser could not be charged upon a demand made in the city of New York, although the note bore date at that place. This I understand to be the settled and invariable rule where the maker has not removed from the State, but has a known residence within its limits. Where, after a note has been given, the maker absconds, removes into another State or country, or is without a fixed residence anywhere, other principles, as we shall see, apply; but in no case does the date of a note, of itself, make that the place where payment should be demanded in order to charge the indorser.

It has been supposed that the case of *Stewart v. Eden*, 2 Caines, 121, countenances a different doctrine. Livingston, J., there said, "The note being dated in New York, the maker and indorser are presumed to have resided, and contemplated payment, there." This remark was in part strictly correct, for the date of the note was presumptive evidence of residence; and in a general sense it may also be true that the date raises a presumption that the parties contemplated payment at that place. Judge Livingston did not say that the note was by law payable at the place of its date; on the contrary, the form of expression conclusively repels that idea. He was not speaking of what the parties were bound to do by the terms of the note, of their legal obligations flowing from their engagements as maker and indorser, but simply of what they were presumed to have contemplated. If the learned judge intended to affirm that a note, when no particular place of payment is otherwise indicated, is by law payable at the place where dated, he would have said so in direct terms, and would not have said it was to be presumed payment at that place was contemplated. This would have been absurd. But in truth the question whether the note in that case was payable where it bore date was not before the court, nor was it there pretended that

payment had not been duly demanded. It was an action against the representatives of a deceased indorser; and although an objection was taken to the form in which the presentment for payment was alleged in the declaration, it was not pretended by any one that the demand of payment had not been strictly correct. The main question in the case was as to the sufficiency of the notice to the indorser, and the remark of the judge was made in discussing that point. I admit that upon the question of due diligence in giving notice to an indorser, it may have been very pertinent and proper to say that the parties are presumed to have contemplated payment at the place where the note was given and was dated, although such a remark would be altogether out of place in deciding upon the construction of an agreement, and whether the parties, by its terms, were bound to make payment at a particular place. There is nothing therefore in this remark of Judge Livingston which can be made to countenance the idea that a note, when no other place of payment is specified, is by law payable at the place of its date. *Anderson v. Drake, supra*; *Bank of America v. Woodworth*, 18 Johns. 315, 322.

Where a promissory note is not made payable at any particular place, the general rule of law is, that in order to charge the indorser payment must be demanded of "the maker personally, or at his dwelling-house, or other place of abode, or at his counting-house or place of business." Story, *Promissory Notes*, § 235; *Bank of America v. Woodworth*, 18 Johns. 315; s. c., in error, 19 Johns. 391. But although such is the general rule, yet, under various circumstances, a demand in any form or manner may be dispensed with. It is a question of diligence, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder.

Thus, where the maker has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold the indorser. 1 *Ld. Raym.* 443, 743; 3 *Kent*, 5th ed., 96; *Putnam v. Sullivan*, 4 *Mass.* 45, 53; *Lehman v. Jones*, 1 *Watts & S.* 126; *Chitty, Bills*, 10th *Am. ed.*, 354, n. 1; Story, *Promissory Notes*, § 237.

Where the maker is a seaman on a voyage, having no domicile in the State, the indorser is liable without a demand being made. *Barrett v. Wills*, 4 *Leigh*, 114. But, although the maker may be absent on a voyage, if he has a domicile in the State, payment must be demanded there. *Dennie v. Walker*, 7 *N. H.* 199; *Whittier v. Graffam*, 3 *Greenl.* 82.

And in every case where the maker has no known residence or place at which the note can be presented for payment, the holder will in like manner be excused from making any demand whatever. Story, *Promissory Notes*, § 237; *Whittier v. Graffam, supra*; *Putnam v. Sullivan, supra*; *Duncan v. McCullough*, 4 *Serg. & Rawle*, 480. But,

in all such cases, the reason for not making a demand must be shown on the trial of the cause. It must appear that the maker had absconded, was at sea, or had no known domicile or place where the note should be presented. The rule is strict, that a demand must be made, or a proper excuse shown for its omission.

There is a further exception to the rule requiring a demand to be made of the maker, or at his domicile or place of business; for where a note is made by a resident of the State, who, before it is payable, removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to make demand, but it is sufficient to present the note for payment at the former place of residence of the maker. *McGruder v. Bank of Washington*, 9 Wheat. 598, *post*; *Anderson v. Drake*, *supra*; *Dennie v. Walker*, *supra*; *Gillespie v. Hannahan*, 4 McCord, 503; *Reid v. Morrison*, 2 Watts & S. 401; 3 Kent, 96. And this is just; for it is but reasonable to suppose that neither party, when the note was given, looked for a change of residence to a foreign country, and that each contracted upon the supposition that no such change would take place. Nevertheless, as was said in *Dennie v. Walker*, *supra*, "this is an exception to the general rule, and must be construed strictly." "We think," say the court in *McGruder v. Bank of Washington*, *supra*, "that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point, there is no other rule that can be laid down which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed."

These exceptions to the general rule, it will be seen, all rest on peculiar reasons. In one, the maker has absconded; in another, he is temporarily absent, and has no domicile or place of business within the State; in a third, his residence, if any he has, cannot be ascertained; while in the fourth, he has removed out of the State and taken up his residence in another country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note; and it is this new and changed condition of the maker, and that only, by which the indorser stands committed, without a regular demand.

We are, then, to inquire whether these exceptions are to be multiplied, and extended to a case where no change in the condition of either party has taken place; where the maker, when the note was made and indorsed, had a known residence in another State, and which had remained unchanged at the maturity of the note. It is palpable that this exception, if made, must be placed on some new

principle; it cannot be allowed on the ground which upholds the others. The facts in this case are unchanged; and, as the reason for making an exception does not exist, the exception itself should not be allowed. Unless, therefore, the general position is true, that one who indorses for a maker who lives in another State may be "held liable without any demand being made on the maker," I think the defendant was not liable in the case at bar. And if any such general rule of law as I have stated exists, it certainly may be shown; but that it has no existence is, as I believe, not only according to the universal understanding amongst commercial men, but also according to the settled course of business in the commercial world.

The indorsement of a note is an order to the maker to pay the amount to the indorsee or holder, as is specified and agreed in the note, and an engagement by the indorser that if the note is duly demanded of the maker and not paid, or if it shall be found impracticable to make a demand, the indorser will himself, on receiving due notice, pay the amount to the indorsee or holder. Now, where such an order is drawn upon a maker who resides in another State, and which is well known to the person in whose favor the order is drawn, upon what principle can it be said that a demand of the maker is unnecessary? The indorsee voluntarily consents to take such an order, and why should he not perform the condition on which the ultimate liability of the indorser depends? I confess I see no reason why he should not. Here is no mistake, or misapprehension of fact, at the time the indorsement is made. The indorsee knows where the maker resides, and that it is in another State. He knows that by law, unless the intervention of a State line makes a difference, the maker must be sought where he resides, and the demand must be made there. When the time for payment arrives, the maker is still at his former residence; the facts of the case are precisely as they were when the order was drawn. Why, in such a case, should the State line make a difference in the construction and legal effect of this contract of the indorser? It was fairly entered into between the parties; let it then be fairly observed and performed by them.

I can well understand why such an order made by an indorser upon the maker of a note *then residing within this State*, but who removes into another State before the note falls due, should receive a different construction, and that it would be unreasonable to require the holder to follow the maker to his new residence in order to demand payment. Here, a new and unlooked-for event has occurred, which, like the absconding of a maker, or an inability to discover his residence, may very reasonably be held to excuse a demand. In these respects, the indorser should be held to stand committed by the act of the maker. But where the facts, in reference to which the parties contracted, were fully known to them, and are in no respect changed, I am unable to discover any principle which will excuse the maker

from making a demand, or using proper diligence to make a demand, as in ordinary cases. The intervention of a State line has, in my opinion, no possible bearing on the question.

I admit that I have not found any case in which this point has been expressly adjudicated as I have stated it. It seems, however, to have been taken for granted, in the case of *McGruder v. The Bank of Washington*, already referred to. The case of *Duncan v. McCullough, Adm'r, etc.*, 4 Serg. & Rawle, 480, was, in some of its features, much like the one at bar. . . .

[Here follows a discussion of this case. The court then proceeds:] And here let me observe that, although the date of a note does not make it payable at that place, still the date may, in one respect, be very important. It raises a presumption that the maker resides there, although it is only presumption. 3 Kent, 96, 97; *Lowery v. Scott*, 24 Wend. 358; *Galpin v. Hard*, 3 McCord, 394. And where it becomes a question of due diligence in seeking to make a demand, it may be all important to show that inquiry was made at the place where the note bears date. But here, this point is of no consequence, for the residence of the maker was known to all parties, and not the least effort was made to make demand of him where he lived, or at any other place than Troy, where the indorser resided, the maker then being at his home in Florida.

I am aware that Judge Story, in his treatise on Promissory Notes, after adverting to various grounds on which a demand of payment may be excused, says: "It seems, also, that if the maker of a promissory note resides and has his domicile in one State, and actually dates and makes and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there." § 236. For this he refers to the case of *Hepburn v. Toledano*, 10 Mart. (La.) 643. It will be observed that Judge Story does not give to this position the authority of his name and character; the point is stated doubtingly. It seems, he says, that under such circumstances the maker need not be sought in the State where he resides, and not that it is clear this will excuse the usual demand. The learned author was obviously doing no more than to state what seemed to him to have been decided in Louisiana, and he does it in a manner which precludes the idea that he intended to adopt the principle, or give to it any authority beyond that of the elevated and able tribunal by which the case was determined. I have looked at the report of the case of *Hepburn v. Toledano*.

I must say that my impression upon this case is that the maker of the note had removed from Louisiana after the giving of the note; but, if the fact were otherwise, I think the decision should not be

followed. The case is not strictly authority, although harmony in the decisions of the several State courts, upon such a point, is exceedingly desirable. But I cannot assent to the principle that where no change has taken place in the residence of the maker, between the making of the note and the time of its payment, the intervention of a State line dispenses with the necessity of making due demand of payment, or at all affects the question. I therefore think the nonsuit was right, and a new trial should be denied.

New trial denied.

WEST *v.* BROWN.

Supreme Court of Ohio, December, 1856. 6 Ohio St. 542.

A room, in the office of another, being one's only place for receiving business calls, and being a place at which one gives notice that word left there will find one, is a proper place for making demand of payment.

THE case is stated in the opinion.

[Argument reported.]

BOWEN, J. The suit below was on the following note:

“CINCINNATI, Nov. 20, 1854.

Three months after date I promise to pay to the order of Samuel West one hundred and fifty dollars, value received.

(Signed) JOSEPH B. BABCOCK.

(Indorsed) SAMUEL WEST.”

The note was discounted by the defendant and proceeds paid to Babcock, the maker. It was afterward left at the Union Bank for collection. Notice was sent by the bank to Babcock some time before it matured, that this note would fall due on the 23d of February, 1855, at said Union Bank.

Babcock resided in the eastern part of the city. He had no place of business exclusively his own. He was allowed to occupy the office of Mr. Harding, on Vine Street, which was the place where he received business calls and directed them to be made. The business of Babcock at the time was that of a small vender of pamphlets and periodicals in the streets of the city. He had told persons that information left for him at Harding's would find him. The notary public states that he went to the said office of Babcock, on Vine Street, between four and five o'clock P. M., on the 23d of February, and demanded payment of the note. He was told there were no funds there to pay, and that Mr. Babcock was out; whereupon he protested

the note for non-payment, and on the next day he put a notice in the post-office for West, the indorser, directed to him at Milford, Ohio. West received the notice on the 27th or 28th of February, postmarked Cincinnati, February 26. The notary says that he is confident that he mailed the notice to West before nine o'clock on the day after the protest, and that early business in Cincinnati, at that season of the year, did not commence before seven or eight o'clock in the morning. Milford is fifteen miles from Cincinnati, and it was shown that the mail was closed daily, for that place, at five o'clock A. M., and that all letters put into the office after that hour, for Milford, would not go until the next mail; that in this case the next mail day was Monday, the 26th of February. Sunday, the 25th, intervened, when there was no mail.

West was an accommodation indorser for Babcock.

The cause was submitted to the court below as to West, and a judgment found for the plaintiff, when the defendant moved the court to grant him a new trial, which motion was refused, and a bill of exceptions was tendered and allowed. Judgment was taken by default against Babcock.

Two points are relied on by the plaintiff in error, to reverse the proceedings of the Superior Court. 1. That no such demand of payment was made of Babcock, the maker, as the case required. 2. That there was no legal notice of demand and non-payment served on West, the indorser.

First. This note was deposited with a bank for collection, and, according to the usage of bankers in Cincinnati, Babcock was personally notified of the place where and of the time when the paper would become due. Although no place of payment was named in the note, yet as the maker resided in Cincinnati, it was not unreasonable to require payment of it to be made at one of the banking houses of the city. It was the manifest duty of Babcock to have taken up the note at the Union Bank, in compliance with the notice which he received for that purpose. But having failed to do that, the notary public called at his place of receiving customers, and formally demanded payment. It is said that the demand ought to have been made at his family residence, and could not be made elsewhere, as he had no well established business office. It seems that he occupied a room at Harding's, where he directed calls to be made and where he received them. By his own acts and declarations he authorized this place to be known as his office for transacting business. He apprised the public that he could be found there, that "word left there would find him." He claimed no other business location. He gave no directions or authority for calling on him, for business purposes, at his residence. His desire was to have an office for doing business, where he might conveniently and with certainty be found, and a selection of such place he accordingly made at Harding's, where he

was sought by the notary public, but when applied for happened to be out. The object of the visit, however, was fully explained to those who were found in the office. We are satisfied that reasonable diligence in this case was used by the holder of the note to obtain payment from Babcock, and that the claim that no demand of payment was made of him is not well founded.

. . . [On the second point it was held that the defendant was duly notified.]

The judgment of the Superior Court is

Affirmed.

CHICOPEE BANK v. PHILADELPHIA BANK.

Supreme Court of the United States, December, 1869. 8 Wall. 641.

When the instrument is payable at a bank, there is an equivalent of presentment; in such a case, the presence of the instrument in the bank, at maturity, *to the knowledge of the bank*, is sufficient.¹

ACTION of negligence to recover the amount of a bill of exchange, brought by the National Bank of Philadelphia against the Chicopee Bank of Springfield, Mass. The plaintiff bank alleged that, through the negligence of the defendant bank, it had lost its right to have recourse against the drawer and indorser to recover the amount of the bill.

The bill had been accepted by the drawee, payable at the Chicopee Bank, and was due Saturday, February 19, 1865. On February 13 the holder of the bill indorsed it to the Philadelphia Bank, which, on that day, forwarded it, by mail, to the defendant bank. The letter containing the bill was delivered at the bank, but did not come into the hands of the cashier, because it had slipped through a crack in the table on which the mail had been placed, and it did not appear that the presence of the letter in the bank was known to any of the bank officials.

On Monday, the 20th, the cashier of the plaintiff bank telegraphed inquiring if the bill had arrived, and on the same day received a telegram from the defendant's cashier, saying, "Not yet received"; he communicated this fact to the indorser, but took no other steps.

The acceptor did not call at the Chicopee Bank on the day of maturity to pay the bill.

The court instructed the jury that to constitute a valid presentment and demand, the bill in such a case as this must be in the bank, *ready to be delivered* to the acceptor on the day of maturity; that on the facts in the case there had been no presentment and demand;

¹ Cf. N. I. L. §§ 87, 92.

and that if the fact that the bill was not ready to be delivered to the acceptor, was due to the negligence of the defendant, the plaintiff could recover.

Verdict for the plaintiff. Writ of error.

[Argument reported.]

NELSON, J. The case was put to the jury, whether or not the loss of the bill, and consequent inability of the collection bank to take the proper steps against the acceptors to charge the prior parties, was attributable to negligence, and want of care on the part of the Chicopee Bank, and that, if it was, the bank was responsible. The jury found for the plaintiffs.

In cases where the drawee accepts the bill, generally, in order to charge the drawer or indorser, the holder must present the paper, when due, at his place of business, if he has one, if not, at his dwelling or residence, and demand payment; and, if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place, and payment demanded. In these instances, as a general rule, the bill must be present when the demand is made, as in case of payment the acceptor is entitled to it as his voucher. When the bill is made payable at a bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to payment of the paper, constitute a sufficient presentment and demand; and, if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is, that the paper was in the bank, and the burden rests upon the defendant to show that the acceptor called to pay it.

In the present case it is argued that the bill was in the Chicopee Bank at the time of its maturity, and, as the acceptors had no funds there, a sufficient presentment and demand were made, according to the law merchant. It is true the bill was there physically, but, within the sense of this law, it was no more present at the bank than if it had been lost in the street by the messenger on his way from the post-office to the bank, and had remained there at maturity; and this loss, which occasioned the failure to take the proper steps, or, rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties, and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant. The radical vice in the defence being the

failure to prove a presentment and demand upon the acceptors at the maturity of the bill, the question of notice is unimportant.

But, if it had been otherwise, the notice itself was utterly defective. That relied on is the answer of the defendant to the telegram of the plaintiff of the 20th February, which was that the bill had not yet been received. This was after its maturity, and it simply advised the holder and payee indorser, to whom the information was communicated the same day, that the drawer and indorser were discharged from any liability on the paper. It showed that the proper steps had not been taken against the acceptors to charge them.

Some criticism is made upon the refusal of the court below to charge, as to which side the burden of proof belonged, in respect to the question of negligence and want of care, after the paper came into the hands of the defendant. No objection is taken to the charge itself, upon this question, and, indeed, could not have been, as the point was submitted to the jury as favorably to the defendants as could have been asked. We think the court, after having submitted fairly the evidence on both sides bearing upon the question, had a right, in the exercise of its discretion, to refuse the request.

If, however, the court had inclined to go further, and charge as to the burden of proof, it should have been that it belonged to the defendant. The loss of the bill by the bank carried with it the presumption of negligence, and want of care; and, if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is that the loss or damage was occasioned by his negligence, or want of care of himself or of his servants. This presumption arises with respect to goods lost or injured, which have been deposited in a public inn, or which had been intrusted to a common carrier. But the presumption may be rebutted. *Dawson v. Chamney*, 5 Q. B. 164; *Coggs v. Bernard*, 2 Ld. Raym. 918; *Day v. Riddle*, 16 Vt. 48.

Judgment affirmed.

GRAND BANK *v.* BLANCHARD.

Supreme Court of Massachusetts, November, 1839. 23 Pickering, 305.

There may be another equivalent of presentment, as where, by custom in the locality, an instrument payable generally is lodged in a bank for collection, and the bank notifies the maker, drawee, or acceptor of the fact, and requests payment.

By an agreed statement of facts it appeared that this was an action by a bank established in the town of Marblehead, against the defendant, a resident in that town, as indorser of a promissory note;

that the plaintiffs demanded payment of the makers, according to the usual course of business of the bank, by a notice informing them that the note was due, and that it was at the bank for payment; that the note not having been paid, the cashier, on the afternoon of the last day of grace, wrote a notice of such non-payment, addressed to the defendant, and gave the same to the messenger of the bank to be delivered to the defendant; that the messenger did not deliver it to the defendant until between eight and nine o'clock of the next morning, before the usual time of opening the bank for business; and that the makers of the note became insolvent several months before it was payable.

It was the usual course of business at the bank, to deliver notices of non-payment to indorsers, on the last day of grace, immediately after the bank was closed.

If the notice given to the defendant was sufficient, he was to be defaulted; otherwise, the plaintiffs were to become nonsuit.

[Argument not reported.]

SHAW, C. J. A question was made by the counsel for the defendant, whether the defendant could be liable as indorser, without an actual presentment to the makers, and a refusal by them, it not appearing affirmatively, that the defendant was conusant of the bank usage respecting the mode of demand. This point was afterwards waived, and is not material in the present case. But the custom of the banks of Massachusetts, of sending a notice to the maker of a note to come to the bank and pay it, and treating his neglect to do so during bank hours, on the last day of grace, as a dishonor, and all parties acquiescing in, and consenting to, such neglect as a dishonor, has become so universal and continued so long, that it may well be doubted, whether it ought not now to be treated as one of those customs of merchants, of which the law will take notice, so that every man, who is sufficiently a man of business to indorse a note, may be presumed to be acquainted with it, and assent to it, at least until the contrary is expressly shown. It is to be recollected, that the rules respecting presentment, demand, and dishonor of bills of exchange and promissory notes, and indeed the *lex mercatoria* generally, originated in the custom of merchants, which custom was a matter of fact to be proved by the party relying on it, and to be determined by the jury. But when a custom has been definitely settled by judicial decisions, it is taken notice of by courts as part of the law of the land, and need not be proved as a fact in each case. 1 Bl. Comm. 75; *Edie v. East Ind. Co.*, 2 Burr. 1226. But the point being waived, it is not necessary to say whether the plaintiff must have failed for want of a statement of that usage in the facts agreed.

It is conceded in the case, that the presentment of the note to the maker, his neglect to pay it during bank hours, on the last day of grace, conformably to the usage of the bank, constituted the dishonor of the note. But the defendant insists, that the notice to him was not seasonable, because the bank have been accustomed to send notice to indorsers, on the afternoon of the last day of grace, soon after the bank closes; and, therefore, they did not in this case conform to their own usage, the notice not being sent till next morning; and the defendant relies on the authority of *Boston Bank v. Hodges*, 9 Pick. 420. The settled general rule of the mercantile law is, that notice to the indorser on the day of the dishonor and after it, or in the course of the next succeeding day, is seasonable. All that is peculiar in the custom and usage of banks, in this State, affects the mode of presentment. The presentment to the promisor, and the giving of notice to the indorser, are distinct acts. The presentment being good according to custom, and the note remaining unpaid in the bank, it was dishonored;¹ then the only remaining question was, whether the defendant had seasonable notice. If the bank had the afternoon of the day of dishonor, and the whole of the next day, to give notice, we do not think that their right is restrained by the fact, that they have usually done their duty promptly at the earliest time. It is to be presumed, that banks, acting upon important interests, in pursuance of general rules, by officers, to whom particular duties are specially assigned, would give their notices at their earliest time after the dishonor; but that does not restrain their liberty allowed by law and by general mercantile usage, when they have occasion to use it.

The case differs entirely from *Boston Bank v. Hodges*. There the note was not dishonored when the indorser had notice, nor even when the suit was brought; not by presentment to the makers, for none had been made; nor by a notice to the maker to come to the bank and pay it, during the banking hours of the last day of grace, and his failure to do so, because it was sued before the commencement of those banking hours. The cause was decided upon the ground, that there had been no legal demand upon the maker, either according to the general rule of law, or according to their usage; but the principles of the decision, we think, do not touch the present case.

Judgment for the plaintiffs.

¹ Cf. *West v. Brown*, 6 Ohio St. 542, ante, p. 220.

MONTELIUS v. CHARLES.

Supreme Court of Illinois, January, 1875. 76 Ill. 303.

A bill of exchange not payable at a fixed date, must be presented to the drawee within a reasonable time after the last negotiation thereof.¹

APPEAL from a judgment in favor of the plaintiffs. The case is stated in the opinion.

[Argument not reported.]

SCOTT, J. This action was upon an inland bill of exchange, in the name of a remote assignee, against the drawers. One important question is, whether the holders had been guilty of such laches, before presenting it to the drawee for payment, as would bar a recovery against the drawers.

Defendants were engaged in the banking business at Piper City in this State. On the 8th of September, 1873, on the application of James McBride, they drew their draft on the Franklin Bank of Chicago, payable at sight, to the order of John Strank, who then resided at Canton in Dakota. It was, on the same day, deposited in the post-office, directed to the payee at Canton, who received it after some delay attributable alone to the fault of the mails. Having passed through the hands of several holders, it was presented on the 13th day of October, 1873, to the bank for payment, which being refused, it was protested, and notice given through the post-office to the drawers and the several indorsers. In the meantime the Franklin Bank, on which the draft had been drawn, had failed and gone into bankruptcy.

The law is settled by an unbroken line of decisions that all drafts,² whether foreign or inland bills, must be presented to the drawee within a reasonable time, and in case of non-payment notice must be given promptly to the drawer to charge him. But what is a reasonable time, under all the circumstances, is sometimes a most difficult question. The general doctrine is, each case must depend on its own peculiar facts and be judged accordingly.

In *Strong v. King*, 35 Ill. 9, it was declared to be a general rule, that the holder of a sight draft must put it in circulation, or present it for payment at furthest on the next business day after its reception, if within the reach of the person on whom it is drawn. In the case at bar the draft was put in circulation, and the point is made, that the mere fact it was not presented for payment until after the lapse of thirty-five days is *per se* such laches on the part of the holders as would discharge the drawers.

¹ See N. I. L. §§ 88, 161.

² The court apparently had in mind the case of sight bills, which was the case under discussion. See N. I. L. § 160.

In *Muilman v. D'Eguino*, 2 H. Black. 565, Eyre, C. J., said: "Courts have been very cautious in fixing any time for an inland bill payable at a certain period after sight to be presented for acceptance, and it seems to me more necessary to be cautious with respect to foreign bills payable in that manner.¹ If, instead of drawing their foreign bills payable at usances in the old way, merchants choose, for their own convenience, to draw them in this manner and make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think, indeed, the holder is bound to present the bill in a reasonable time, in order that the period may commence from which the payment is to take place. The question what is a reasonable time must depend on the peculiar circumstances of the case, and it must always be for the jury to determine whether laches is imputable to the plaintiff." Buller, J.: "Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. But here I must observe that I think a rule may thus far be laid down with regard to all bills payable at sight, or at a certain time after sight, namely, that they ought to be put into circulation. If they are circulated, the parties are known to the world and their credit is looked to; and if a bill, drawn at three days' sight, were kept out in that way for a year, I cannot say that there would be laches. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches."

Bills, both inland and foreign, having the quality of negotiability, are intended in some degree to be used as a part of the circulation of the country, and are indispensable in the conduct of extended commercial transactions. They afford a safe and convenient mode of making payments of indebtedness between distant points. Banking houses that for a consideration issue such bills must be understood to do so in accordance with the known custom of the country, — that they will be put in circulation for a limited period. If this were not so, their value would be greatly depreciated, and their utility in commercial transactions would be destroyed. Were it understood the purchaser of such a bill was bound to make all possible despatch to present it to the drawee or lose his recourse on the drawer, no prudent man would feel safe in taking one. He may know the drawer from whom he purchases the bill and be willing

¹ The bill in that case was a foreign bill, drawn in five sets, March 5, 1793, in London, on Calcutta; the sets were sent to India in May following and reached there October 3 of that year. Four of the sets were protested for non-acceptance on the 29th of the same month, and the fifth on the 18th of the next month. The causes of delay are stated in the report of the case. The jury found that there had been no laches, and the verdict was upheld.

to rely on his responsibility; but in many cases he has and can have no knowledge of the drawer's correspondent, the drawee. Commercial usage has therefore placed the responsibility upon the drawer, and he is presumed, in consideration of the premium paid, to assume all risks as to the solvency of the drawee for such reasonable time as the bill shall be kept in circulation. There can be no doubt, if the holder locks it up and keeps it out of circulation, he assumes all risks, and in case the bill is dishonored his laches in that regard would bar a recovery against the drawer. Such bills are not issued with a view to be held as a permanent security, with a continuing liability in the drawer. Illustrative of the law of this branch of the case is *Shute v. Robbins*, 3 Car. & P. 80.

The difficulty is, to determine for what length of time such a bill may be kept in circulation consistently with a continuing liability in the drawer. The rule adopted, as we have seen, is, it must be presented in a reasonable time under all the circumstances. But courts not infrequently experience great perplexity in making a distinction between a reasonable time for the presentation of such paper and laches on the part of the holder. Every case differs so essentially in its facts, it has given rise to many apparently contradictory decisions; but through all of them is noticeable the effort of the courts to ascertain whether the bill was kept in circulation for only a reasonable period in the regular course of business. When that fact is once established, the liability of the drawer is regarded as continuing. It will be found the decisions differ only in what the various courts deemed reasonable in each particular case.

In *Robinson v. Ames*, 20 Johns. 147, the bill declared on was drawn on the 6th of March, but not presented for payment to the drawees until the 20th of May. In the meantime the drawees had failed; but in a well-reasoned opinion the court came to the conclusion there was no such laches as would discharge the drawer. In *Jordan v. Wheeler*, 20 Tex. 698, the bill in suit was put in circulation and indorsed by defendants without having been presented for acceptance before it came to the hands of the plaintiff. A little more than a month elapsed before he presented it for payment, and that was declared to be according to usage. In *Nichols v. Blackmore*, 27 Tex. 586, the court was of opinion a delay of forty-seven or forty-eight days was not such laches as would forfeit the right of the holder to recourse against the drawer, in default of payment by the drawee.

Many other cases of the same import might be cited, but these are sufficient for our present purpose. They establish, beyond doubt, the fact that there is no fixed period in which the bill must be presented for payment, but that each case must be decided on its own peculiar facts in the light of commercial usage.

In the case at bar the bill was immediately put in circulation. It was mailed to the payee on the day it bore date, to his proper address in Dakota. Some delay occurred, attributable to interruption in the transmission of the mails, but this fact could not be imputed to the payee as laches. On the receipt the payee immediately undertook and availed of the first opportunity to negotiate the bill. It was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory like Dakota. The facts and circumstances proven show no laches on the part of any holder that would operate to discharge the drawers.

Judgment affirmed.

NATIONAL STATE BANK *v.* WEIL.

Supreme Court of Pennsylvania, April, 1891. 21 Atl. Rep. 661; 141 Penn. State, 457.

A cheque should be presented within a reasonable time,¹ which, by custom, in the absence of special circumstances causing delay, is on the day of issue or the day succeeding, to charge the drawer, unless the latter suffer no loss by delay;² to charge an indorser, it must be presented on the day of transfer or the day succeeding.

ASSUMPSIT by the indorsee against the drawer of a cheque. The cheque was drawn by Weil upon the Shackamaxon Bank, on May 26, 1885, and was payable to Doughten, Wilkins & Co., by whom it was indorsed to the plaintiff. The cheque was not presented to the drawee bank until the 29th of May; but the Shackamaxon Bank had suspended payment before the presentment. The defendant filed an affidavit of defence, in which he set up the foregoing facts, and further that, from the time of the delivery of the cheque by him to the payees until the failure of the bank, he had sufficient funds on deposit to meet the cheque, if it had been presented.

A rule to show cause why judgment should not be entered for the plaintiff, was obtained and the judgment of the lower court, discharging the rule, delivered by

BIDDLE, J. The cheque upon which suit is brought in this case was drawn on the twenty-sixth day of May, 1885, by A. Weil, the defendant, residing in the city of Philadelphia, in favor of Doughten, Wilkins & Co., a mercantile house in the same city, upon the Shackamaxon Bank in said city. The cheque was not presented for payment to that bank until the twenty-ninth day of May, after it had suspended payment. It is contended by the defendant that, inasmuch as there were ample funds in the bank to his credit when it failed,

¹ N. I. L. §§ 203, 209.

² But cf. N. I. L. §§ 202, 88.

and that if the said cheque had been duly presented to the said bank at any time prior to the said twenty-ninth day of May, 1885, it would have been paid, the loss was caused by the unreasonable delay in its presentation, and therefore the drawer was not liable upon it. The question, therefore, is whether the delay in its presentation was unreasonable.

When the facts and circumstances are ascertained, the reasonableness of time, said Chancellor Kent, vol. 3, p. 91, is a matter of law, and every case will depend upon its special circumstances. This rule has also been recognized by our Supreme Court. In the case of *National Newark Banking Co. v. National Bank of Erie*, 63 Pa. 404, a travelling collector, after reaching Erie, purchased a draft on New York. The bill was purchased on the seventeenth day of March, and not presented until the twenty-eighth. The court says: "The bill was drawn at Erie, in the State of Pennsylvania at the extreme western end of it, upon persons in the city of New York, and sold to a travelling agent whose residence was in Newark in the State of New Jersey. As all bank-notes in the present day are at par everywhere, the object in purchasing a draft was to prevent loss by theft, robbery, or accident. The business of the agent led him through the different places we have stated, and detained him necessarily on the road, and he was therefore not obliged, nor could it be expected, while so doing, that he would transmit the draft for collection to New York; nor would there be in fact any opportunity to negotiate it until he reached his own home in New Jersey." And again in *Muncy Bor. Sch. D. v. Commonwealth*, 84 Pa. 464, Justice Paxson in giving the opinion of the Supreme Court, says: "'What is reasonable time will depend upon circumstances, and in many cases, upon the time, the mode, and the place of receiving the cheque, and upon the relations of the parties between whom the question arises.' . . . In the present case the draft was drawn on the tenth and presented on the twentieth. It did not come into the hands of the defendants until the thirteenth. It was payable to the order of the 'School Board of Muncy.' It must have been known to the drawers and the plaintiffs that such a draft was liable to be delayed. The fact that it required the indorsement of a board of school directors, which had to be convened and then take action upon the draft, was suggestive of delay. Then there was further delay between Muncy and Watsontown by reason of the mails. This is ground of excuse as we have seen. In point of fact the draft did not reach Watsontown until the evening of the day upon which the drawees failed."

As the circumstances of these cases do not in any respect correspond with those of the case under consideration, they are only valuable as establishing the principle that a reasonable time will depend upon circumstances, and upon the time, mode, and place of

receiving the cheque, and upon the relations of the parties between whom the question arises.

The cheque here in question was drawn by a commercial firm, in a commercial city, upon a city bank, in favor of another commercial firm, and is therefore strictly a mercantile transaction, not complicated by other considerations. There is no question of necessary delay in transmission, nor is any reason suggested why it could not have been presented at once. . . . If presented on the day of its receipt by the payee, it would have been paid; if deposited by him in a city bank on the day of its receipt, it would have been presented on the next day and paid. If deposited the day after its receipt, the twenty-seventh, for collection, it would have been presented on the twenty-eighth, and would then have been paid.

The rule in cases of this character is that, where the parties all reside in the same place, the holder should present the cheque on the day it is received, or the following day; and when payable at a different place from that in which it is negotiated, the cheque should be forwarded by mail on the same or the next succeeding day for presentment. The liability of the drawer cannot, it is apprehended, be enlarged by circulating the cheque; and therefore, to charge him if the banker failed, the cheque, in whose hands soever, must be presented within the period within which the payee or first holder must have presented it; but as against the party transferring the cheque to the holder, it is sufficient, whatever the date of the cheque, to present it or forward it for presentment on the day next after its transfer. *Byles on Bills*, 35-39; *Hay v. Colburn*, 1 Rob. 345; *Gough v. States*, 13 Wend. 549; *Moule v. Brown*, 4 Bing. N. C. 266 (33 E. C. L. R.). The reason for this strictness is said to be that a cheque, unlike a bill of exchange, is generally intended for immediate payment and not for circulation; and therefore, it becomes the duty of the holder to present it for payment as soon as he reasonably may; he keeps it at his own peril, as negotiability is not of its essence, but at most merely an optional quality. *Story on Prom. Notes*, 670-688; *Down v. Halling*, 4 B. & C. 333.

The rule, therefore, is well established in the two greatest commercial cities of the world, that a cheque on a bank where all the parties are residents of the same city, must be presented on the day upon which it bears date, or on the next day, and if not, the risk of the solvency of the drawee is upon the payee. We think that rule should be applied to this case, there being no circumstance to except it from its operation, and that the delay in the presentation of the cheque was "unreasonable." The defendant is therefore not responsible for its non-payment.

The rule for judgment is discharged. The plaintiff appealed.

[Argument not reported.]

Per Curiam. We need not add to what the learned judge below has so well said. He has fully covered the case, and we affirm the order for the reasons given by him.

Order affirmed.

MERRITT v. JACKSON.

Supreme Court of Massachusetts, March, 1902. 181 Mass. 69; 62 N. E. Rep. 987.

So, to charge an indorser on a note payable on demand, presentment must be made within a reasonable time.¹

By custom in some localities, presentment must be made at or before the expiration of sixty days from the issue of the note, unless there are circumstances to excuse delay.

THE case is stated in the opinion.

[Argument not reported.]

LATHROP, J. This is an action against the defendant as indorser of four promissory notes, made by the Jackson Typewriter Company, payable to the defendant, upon demand, and indorsed by him in blank. One note is dated Dec. 19, 1899, and the other three are dated Jan. 5, 1900. Demand was made and notice given on April 4, 1900.

In the Superior Court, after the introduction of evidence not material to the exceptions, the defendant requested the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused so to rule, and found for the plaintiff; and the case is before us upon the defendant's exceptions. The only question in the case is whether the demand was made within a reasonable time.

The Sts. of 1898, c. 533, § 71,² is in part as follows: "Where it (the instrument) is payable on demand presentment must be made within a reasonable time after its issue."

Section 193³ of the same act provides: "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case."

Before the St. of 1898, which took effect on Jan. 1, 1899, was passed, the law applicable to notes payable on demand was regulated by the St. of 1839, c. 121, which was retained in substance in the subsequent compilations of the statutes. Section 1 of this statute provided, in substance, that the maker should have the same defence against an indorsee as against a payee. Section 2 provided that, on any promissory note payable on demand made after the act

¹ N. I. L. §§ 88, 209.

² Id. § 88.

³ Id. 209.

took effect, a demand made at the expiration of sixty days from the date thereof without grace, or at any time within that term, should be deemed to be made within a reasonable time. Section 3 provided for the liability of indorsers.

Section 1 of this act was slightly changed by the St. of 1857, c. 192, but was revived, with an amendment by the St. of 1858, c. 70. And so it appears in the Gen. Sts. c. 53, § 10, and the Pub. Sts. c. 77, § 14. Sections 2 and 3 of the act appear in the Gen. Sts. c. 53, § 8, and the Pub. Sts. c. 77, § 12.

We have no doubt that the section of the Pub. Sts. c. 77, last mentioned has been repealed by § 197 of the St. of 1898, which provides: "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." We are therefore obliged to consider what is the law merchant, which was in force in this Commonwealth before the St. of 1839 took effect, and which is restored by the St. of 1898.¹

Before the St. of 1839, c. 121, was passed, the rule was well settled that as to a promissory note payable on demand, a demand in order to charge an indorser must be made within a reasonable time, and if no such demand was made, the note was considered as overdue and dishonored. This question arose also in another class of cases, namely, as to the length of time in which a note payable on demand, and remaining unpaid, would be held to be dishonored, and subject to the grounds of defence which would be open to the maker in a suit by the payee. See *Paine v. Central Vermont Railroad*, 118 U. S. 152, 160.

But while the general rule was well settled, there was found to be great difficulty in its application; and it was said to be impossible to fix any precise period, as each case depended upon its particular circumstances. Parker, C. J., in *Field v. Nickerson*, 13 Mass. 131, 137. In *Seaver v. Lincoln*, 21 Pick. 267, it was said by Chief Justice Shaw, "One of the most difficult questions presented for the decision of a court of law, is, what shall be deemed a reasonable time, within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another."

As to what has been held by this court to be a reasonable or unreasonable time, the cases are thus summed up by Mr. Justice Dewey, in *Ranger v. Cary*, 1 Met. 369, 374: "In *Field v. Nickerson*, 13 Mass. 131, the period of eight months was held not to be within a reasonable time to make a demand to charge the indorser; and in *Seaver v. Lincoln*, 21 Pick. 267, where the demand was made in seven days after the date of the note, it was held to be within due time.

¹ N. L. L. § 212.

In *Sylvester v. Crapo*, 15 Pick. 92, a note that had remained unpaid for eleven months before it was negotiated, was held to be dishonored; and the shorter period of six months was, in *Thompson v. Hale*, 6 Pick. 259, held sufficient to subject it to the defence of a note overdue. On the other hand, a note indorsed seven days after its date was held, in *Thurston v. M'Kown*, 6 Mass. 428, to have been transferred in season to avoid any ground of defence arising from the equities between the original parties."

In *Ranger v. Cary* it was held that a note payable on demand was not to be regarded as overdue if indorsed within one month after its date.

In the case before us no evidence was introduced of "the usage of trade or business, if any, with respect to such instruments," nor do the facts of the case appear apart from what the instrument itself shows.

We have no doubt that when the holder of such a note seeks to hold an indorser, the burden is on him to show that a demand was made upon the maker within a reasonable time; and that if there is any usage of trade or any fact or circumstance to excuse a delay, the burden is on him to show it. See *Keyes v. Fenstermaker*, 24 Cal. 329.

It is urged, however, that the court will take judicial notice of business in a community including the universal practice of banks; and attention is called to the fact that in the charge to the jury in *Field v. Nickerson*, 13 Mass. 131, 132, where the question was whether an action could be maintained by an indorsee against an indorser on a promissory note payable on demand, where the demand was made on the maker eight months after the date of the note, Chief Justice Parker, after stating to the jury that the demand must be made in a reasonable time, and that what was a reasonable time was a question of law in that case, further instructed the jury, "that, all the parties to the transaction living in a town where credit for loans of money among merchants is commonly given for thirty, sixty, or ninety days, the indorser must be considered as having contracted with reference to the usual period; that a delay of eight months was unreasonable . . ." The jury were directed to return a verdict for the defendant. Nothing is said on this subject in the opinion. Whether or not an analogy can be drawn from the fact that in the business community the rate of credit may be thirty, sixty, or ninety days, the St. of 1898, c. 533, § 193, as we already have pointed out, limits the question of usage to that of trade or business "with respect to such instruments." The statute took effect on January 1, 1899. All but one of the notes in suit were dated early in January of the next year. We are not aware that in the interval any usage of trade or business with respect to demand notes

had grown up different from that which had had the force of law for nearly sixty years.

In a case like the present, in the absence of any evidence to bring the case within § 193 of the St. of 1898, we are of opinion that a demand on the maker should be made at or before the expiration of sixty days; that the demand in this case was not made within a reasonable time; and that the ruling requested should have been given.

Exceptions sustained.

NOTE.— In *Yates v. Goodwin*, 96 Me. 90, an action was brought by the holder against an indorser of a note in the following form :

"\$1500.

BIDDEFORD, March 16, 1894.

On demand for value received the Ensor Remedy Company of Biddeford promises to pay to its own order the sum of fifteen hundred dollars with interest at the rate of four per cent per annum.

THE ENSOR REMEDY CO.

By C. E. GOODWIN, *Treas.*"

The note, indorsed by the Ensor Co., and by the defendant, came, through the hands of several intermediate holders, to the plaintiff, who was a holder for value. It was proved that presentment was made on the makers, on Nov. 13, 1894, and the defendant contended that such presentment was not reasonable.

It was said by SAVAGE, J., "What is a reasonable time within which payment must be demanded, in order to hold an indorser, is a matter of law. *Goodwin v. Davenport*, 47 Me. 112, 74 Am. Dec. 478. It is likewise a matter of no little difficulty. Said Justice RICE, in *Goodwin v. Davenport*, *supra*, 'the precise number of days, weeks, or months, even, which will constitute a "reasonable time" has never been, although a question of law, judicially determined, but is made to depend upon circumstances as variable and uncertain as are the transactions and characters of men.' Periods ranging from a few days to many months have severally been held to be a 'reasonable time,' while in other cases by the lapse of similar periods, without demand, indorsers have been released.

The purpose of the note, and the intention of the parties respecting it are important factors. Was the note given in payment of indebtedness in the current course of business? If so, the natural presumption would be that it was expected to be paid without long delay. Or was the note given for a loan, and with interest? If so, it is held that the indorser remains liable without immediate presentment. 3 Randolph, Com. Paper, p. 82; 1 Daniel on Negotiable Inst., p. 451. The parties do not expect immediate or early demand. Such a demand, if complied with, would defeat the very object of the loan. It is held also that the provision in a demand note for the payment of interest is material, as raising the presumption that immediate payment was not intended by the parties. 3 Randolph on Com. Paper, 83. These views are well supported by the authorities. *Lockwood v. Crawford*, 18 Conn. 361; *Wetley v. Andrews*, 3 Hill, 582; *Chartered Mercantile Bank v. Dickson*, L. R. 3 C. P. 574; *Cate v. Patterson*, 25 Mich. 191; *Gascoyne v. Smith*,

1 McC. & Y. 338; *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243; *Parker v. Stroud*, 98 N. Y. 379, 50 Am. Rep. 683.

The note in question here was given for a loan, and it bore interest. The interest was at lower rate than would have been recoverable had no mention been made of the rate of interest. This fact is itself significant. For if it was expected that [payment of] the note was to be demanded within a short time, would the parties have been likely to stipulate a less rate than the statute rate? Besides, the maker was a corporation borrowing money. The indorsers, some or all of them, were the officers of the corporation. Such was the defendant. It can hardly be supposed that this money was hired with the expectation on the part of any one concerned that payment of the note was to be immediately demanded or made, or indeed, within any short period.

We think, on the contrary, that the note, given for a loan, was intended to be a continuing security, an investment of a more or less permanent character. Being on demand, the holder might, if he chose, demand payment at any time, but it was not expected that he would make immediate or early demand. We think that he was not required to do so, to hold the indorsers."

The defendant was defaulted.

ORIDGE v. SHERBORNE.

Court of Exchequer of England, May, 1843. 11 Meeson & W. 374.

A promissory note payable by instalments is assignable within the Stat. 3 & 4 Anne, c. 9; [and the maker is entitled to the days of grace upon the falling due of each instalment.¹]

ASSUMPSIT by indorsee against payee of a promissory note, dated 19th November, 1838, payable to the defendant by instalments on the 19th of November in each succeeding year, for seven years. This action was brought to recover the amount of the instalment due on the 19th of November, 1842. There were pleas denying that the note was duly presented for payment, or that the defendant had due notice of the presentment and dishonor. At the trial it appeared that the note was presented for payment of the instalment in question on the 22d of November, the plaintiff thus allowing the three days of grace usually given in the case of negotiable instruments; it was dishonored, and notice of the dishonor was given to the defendant the next day. It was objected for the defendant that the presentment and notice of dishonor were too late; that a promissory note payable by instalments was not a negotiable instrument within the law and custom of merchants, and the maker thereof was not entitled to days of grace at all; or, if he were, they could be allowed only for payment of the last instalment. The judge overruled the

¹ Grace is generally abolished by the Statute; but cf. N. I. L. § 102, allowing three days of grace upon a draft or bill of exchange, made payable within this State at sight, unless there is a stipulation to the contrary.

objection, and the plaintiff obtained a verdict. Rule *nisi* for a new trial.

[Argument reported.]

PARKE, B. I think the rule in this case ought to be discharged. The question is, whether, on a promissory note payable by instalments, the usual three days of grace are to be allowed or not. In order to determine this point, the first question that presents itself is, whether such an instrument is a promissory note at all, within the St. 3 & 4 Anne, c. 9, so as to entitle any party into whose hands it may come to sue upon it; for, if so, there will be no difficulty in extending to it the same rule as prevails in the case of bills of exchange; namely, that days of grace are to be allowed in all cases where a sum of money is by such a negotiable instrument made payable at a fixed day. Now, in order to render this valid as a promissory note, we must first consider whether it might be sued on by the original parties to it. It is well known that, before the passing of the St. 3 & 4 Anne, c. 9, it was the opinion of Lord Holt that a promissory note was only *evidence* of a debt, and not an instrument of obligatory force in itself. Then came the statute, which puts promissory notes on the footing of inland bills of exchange. The preamble recites that it had been held "that notes in writing, . . . are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same." . . . The statute is thus directed to two grievances, — that the note is not assignable, and that it is not the subject of an action. Therefore, . . . the statute in the first section goes on to enact that "all notes in writing, whereby any person, body politic or corporate, shall promise to pay to any other person or persons, body politic or corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, etc., to whom the same is made payable." These words are general, and without any limitation as to the *mode* in which the money is to be paid. The section goes on to enact that "every such note shall be made assignable or indorsable over." . . . On the provisions of this statute, therefore, we find no limitation imposed as to the manner in which the money is to be made payable; and consequently, unless there is some established rule or settled practice to the contrary, a promissory note must be deemed good within the statute, whether it be to pay an entire sum at once, or to pay it by instalments. No case has been cited to show that a promissory note in the latter form is not good, and we must therefore look at the

course pursued in practice since the statute. Speaking from modern experience (and mine in this respect has been of some standing), I have no doubt that numerous actions have been brought by the original parties in whose favor such notes have been made; indeed, that this is so every gentleman in the habit of drawing under the bar can testify; and it is now much too late to say such actions as those are not maintainable. And if promissory notes are within the first clause of the statute, I see no sufficient reason why they should not also be within the second, and consequently assignable to an indorsee. Besides the invariable practice on this subject, and the fact that actions on notes of this kind have been so numerous, that it is, I may say, impossible that the present objection should not have been taken in some of them, if there were really any weight in it, several reported cases have been referred to, in which such actions were brought, and no objection taken that they would not lie on the ground suggested in this case, although other objections *were* taken. One is that of *Donaldson v. Thompson*, 6 M. & W. 316, to which may be added those of *Ashford v. Hand*, Andr. 370, and *Josselyn v. Lacier*, 10 Mod. 294. If there had ever been any idea that a promissory note of this nature was not within the statute of Anne, the objection would certainly have been taken; although I rely more on the established modern usage, and think it too late to raise this objection now. If, then, this is admitted to be a promissory note, suable on and indorsable under the statute, the next question is respecting the allowance of the usual days of grace upon it. Now, in the case of *Brown v. Harraden*, 4 T. R. 148, it is said that, with respect to the allowance of days of grace, the rule is exactly the same in the case of a promissory note as of a bill of exchange; namely, that they are always to be allowed, when the instrument is for the payment of money at a certain time, as after a certain number of days or after sight, but not when it is only payable on demand. That rule we must adopt in this case; and as this note is suable on and indorsable under the statute of Anne in the same manner as bills of exchange were before, — as both instruments are thereby simply put upon the same footing, — the days of grace for both must be the same, and consequently ought to be allowed on this promissory note.

ROLFE and ALDERSON, BB., delivered concurring opinions.

VINTON *v.* KING.

Supreme Court of Massachusetts, October, 1862. 4 Allen, 562.

And it must be presented at the maturity of each instalment.

WRIT of entry to foreclose a mortgage. The defence was that the note and mortgage were obtained by duress and fraud, and were given

for an illegal consideration. For the purpose of obtaining a decision upon the questions of law arising in the case, ALLEN, C. J., directed a verdict for the plaintiff, in the Superior Court, upon evidence which is sufficiently stated in the opinion; and the defendant alleged exceptions.

[Argument reported.]

METCALF, J. The mortgage, under which the plaintiff claims possession of the premises demanded in his writ, was given to secure payment of a note, dated April 26, 1858, of the following tenor: "Two years after date, by instalments of \$53 in every six months after this date, until fully paid, I promise to pay Peter Bruyett, or bearer, the sum of two hundred and twelve dollars and interest in manner above stated. John King." This note, though payable by instalments, was negotiable, 11 M. & W. 374 (*Oridge v. Sherborne*), and was transferred, and the mortgage assigned to the plaintiff, about three months after the first instalment was overdue and unpaid. This action was commenced on the 30th of May, 1859, after the second instalment was made payable. And if the plaintiff is entitled to any judgment, it is only to a conditional judgment for possession; to wit, unless the defendant pay to him, within the time specified by statute, such sum as shall be found due on the mortgage. Rev. Sta. c. 107, § 5, and Gen. Sta. c. 140, § 5.¹ If the court find that nothing is due on the mortgage, the plaintiff cannot have judgment.

In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure payment of a note, the defendant may show the same matters in defence (the Statute of Limitations excepted, *Thayer v. Mann*, 19 Pick. 535) which he might show in defence of an action on the note. If, therefore, this action were by the mortgagee, Bruyett, instead of his assignee, the plaintiff, the defendant might successfully defend, by showing that the note and mortgage were obtained from him by duress, and the plaintiff does not deny that the same defence may be made against him, if, when the note was transferred to him, it was dishonored by non-payment of the first instalment — it being admitted law, that he who takes a note after it is due takes it subject to all objections and equities to which it was liable in the hands of him from whom he takes it, and to the same defences, in a suit against the maker, which the maker might set up in an action against him by the payee; that the circumstance that a note is overdue makes it incumbent on the party receiving it to satisfy himself that it is a good one, and that if he omit so to do, he must stand in the situation of him who was holder at the time it was due. *Bayley on Bills*, 2d Amer. ed., 133, 544; *Chit. Bills*,

¹ Rev. Laws of Mass., ch. 187, § 5.

12th Amer. ed., 247, 248, 10th Amer. ed., 216-218; 3 Kent Com., 6th ed., 90; Gold v. Eddy, 1 Mass. 1; American Bank v. Jenness, 2 Met. 289; Andrews v. Pond, 13 Pet. 79; Tucker v. Smith, 4 Greenl. 415. But the ground assumed by the plaintiff is, that in this case the note had not, within the rule of law on this subject, come to maturity, and was not overdue and dishonored before it was transferred to him, because the time for payment of the last three instalments had not then come. This ground is not maintainable. As to the first instalment of \$53 in six months, and interest on \$212, the note had come to maturity and was overdue and dishonored when the plaintiff took it; and as to the amount of that instalment, it is not to be doubted that the defendant may make the same defence against the plaintiff, which he might have made against the payee. And we are of opinion that he may make the same defence to the whole note. The note is a single contract to pay \$212 in four half-yearly instalments, and the plaintiff took it with notice on its face that, as to the first instalment the defendant might have a justifiable cause for withholding payment, whatever that cause might be; whether a cause which affected that instalment only, — as a release thereof by the payee, or a legal set-off against him to the amount thereof, — or a cause which, between him and the payee, vitiated the whole note, as want or failure of consideration, unlawful consideration, fraud or duress. And if the payee had sued for the recovery of the first instalment, before the second was made payable, the defendant might have defeated the action by showing that the note was wholly void; and a judgment for him, on such ground of defence, would have been conclusive against the maintenance, by the payee, of a subsequent action to recover the other instalments. Black River Savings Bank v. Edwards, 10 Gray, 387.

The case of Clark v. Pease, 41 N. H. 414,¹ to which we were referred by the plaintiff, would have been an authority in his favor, if he had received the note before it was dishonored, and had shown that he took it *bona fide*, and paid a valuable consideration for it. The authorities are numerous, that against such an indorsee or bearer, the fact that the note was originally obtained by duress is not a legal defence.

Exceptions sustained.

¹ Post, p. 407.

DANA v. SAWYER.

Supreme Court of Maine, April, 1843. 22 Maine, 244.

Presentment should be made at a reasonable hour of the day.¹

Presentment of a promissory note to the maker at near midnight, after he has retired to rest, is not presumptively at a reasonable hour.

THIS case was submitted on the following statement of facts: The action is on a promissory note, signed by T. Sawyer & Co., dated December 24, 1838, for \$202.50, on four months, payable to and indorsed by the defendant.

It is agreed that on the day the note fell due, George W. Smith came to the house occupied by said Thorndike Sawyer and Samuel H. Sawyer, the defendant, in the evening, between eleven and twelve o'clock, called up said T. Sawyer from his bed, and presented the note to him for payment, which he did not pay, and left with him a notice and demand for payment, and delivered another notice of non-payment by the makers of the note, directed to said S. H. Sawyer, and demand of payment to said T. Sawyer for said Samuel, which said Thorndike did not deliver to said Samuel. Said Samuel was then in the house, but was in bed. He had his residence in the same house.

The court were to enter a nonsuit or default, as they might determine to be the law in the matter.

[Argument not reported.]

SHEPLEY, J. This case is presented upon an agreed statement of facts, from which it appears that a demand for payment was made upon the maker of the note, between eleven and twelve o'clock at night on the day that it became payable, by calling him from his bed; and that he did not pay it. There is no further statement of anything else said or done, except that a notice and demand for payment was left with him. When a bill or note is payable at a banking-house, or other place, where it is well known that business is transacted only during certain hours of the day, the law presumes that the parties intended to conform to such established course of business, and requires that a demand should be made during those business hours. *Parker v. Gordon*, 7 East, 385. The cases of *Garnett v. Woodcock*, 1 Stark. 475, and of *Henry v. Lee*, 2 Chitty, 124, may show an exception to this rule that, when a person is found at such place after business hours authorized to give an answer, the demand will be good; while it may be difficult to reconcile these cases with the case of *Elford v. Teed*, 1 M. & S. 28. When the bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. Leftley

¹ N. I. L. § 89, 2.

v. Mills, 4 T. R. 174; *Barclay v. Bailey*, 2 Camp. 527; *Triggs v. Newnham*, 10 Moore, 249; *Wilkins v. Jadis*, 2 Barn. & Adol. 188. What hour may be a reasonable one has come under consideration in those cases. In the first of them Mr. Justice Buller observes, that "to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences." In the second, Lord Ellenborough said, "If the presentment had been during the hours of rest, it would have been altogether unavailing." In the third, this remark, among others, is quoted and approved by C. J. Best. In the fourth, Lord Tenterden remarked, that "a presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable." These observations, so just and so applicable to this case, authorize the conclusion that the demand was not made at a reasonable hour, unless the fact that the maker was seen and actually called upon at that time should make a difference. Perhaps, in analogy to the exception already noticed, it might be proper to admit of one in this and the like cases, if it should appear from the answer made to the demand that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. But there is nothing in this agreed statement to show that payment might not have been refused because the demand was made at such an hour that the maker did not choose to be disturbed, or because he could not then have access to funds prepared and deposited elsewhere for safety.

Plaintiff nonsuit.

FARNSWORTH v. ALLEN.

Supreme Court of Massachusetts, October, 1855. 4 Gray, 453.

But presentment as late as nine o'clock in the evening, in August, is reasonable if due endeavor under all the circumstances down to that time has been made to make it, without success.

ACTION of contract against the indorser of the following promissory note: "Boston, May 23, 1853. Three months after date I promise to pay to the order of Walter M. Allen one hundred and fifty dollars, value received. Francis Freeman."

At the trial in the Court of Common Pleas, a witness testified that he received the note, at the close of bank hours on the last day of grace, from the Grocers' Bank in Boston, who had received the note for collection from the Cambridge Market Bank, but did not know the residence of the maker or indorser; that he inquired of a director of the Cambridge Market Bank, and learned that the maker lived at Winchester and the indorser at North Cambridge; and the same afternoon carried the note to a notary public in Charlestown, and told him where the parties resided.

The notary public testified that, as soon as he could after receiving the note for protest, he went to the house of the maker (about ten miles from Boston), and arrived there about nine o'clock in the evening; that there was no light in the house, and the inmates appeared to have retired for the night; that he rang the bell, and after some time the maker came to the door with a light; and he presented the note, stated its contents, and demanded payment, which the maker refused, saying that he could not, or should not, or would not pay it; that he returned with the note to Charlestown, and on the same evening put in the post-office a proper notice of dishonor, addressed to the defendant at North Cambridge.

The defendant contended that the demand proved was not sufficient to charge the indorser. But HOAR, J., ruled otherwise, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

[Argument reported.]

BIGELOW, J. The note declared on, not being payable at a bank, or at any place where business was transacted during certain stated hours in each day, was properly presented to the maker at his place of residence. It was also the duty of the holder to present it within reasonable hours on the day of its maturity. No fixed rule can be established, by which to determine the hour beyond which a presentment, in such case, will be unreasonable and insufficient to charge an indorser. Generally, however, it should be made at such hour that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. In the present case, taking into consideration the distance of the place of residence of the maker from Boston, where the note was dated, and where it was held when it became due; the means that were taken to ascertain the residence of the maker, and the season of the year at which the note fell due, we are of opinion that a presentment at nine o'clock in the evening was seasonable and sufficient. It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it seasonable or otherwise. *Barclay v. Bailey*, 2 Camp. 527; *Triggs v. Newnham*, 10 Moore, 249, and 1 Car. & P. 631; *Wilkins v. Jadis*, 2 B. & Ad. 188; *Cayuga County Bank v. Hunt*, 2 Hill (N. Y.), 635.

Exceptions overruled.

GATES v. BEECHER.

Court of Appeals of New York, April, 1875. 60 N. Y. 518.

If the parties required to pay are jointly liable, presentment must be made to all,¹ except where they are partners,² or the relation of agency for payment exists between them.

ACTION by the indorsee against the indorser of a promissory note for \$800, dated May 31, 1870, payable in two years. Verdict for the plaintiff, and the defendant appealed. The facts further appear in the opinion.

[Argument reported.]

FOLGER, J. . . .

No place of payment was named in the note. In such case, demand of payment at the usual place of business of the maker, though he be absent, is sufficient; or at his residence; or to him in person. *Holtz v. Boppe*, 37 N. Y. 634. And where such a note is made by a partnership a demand of one of the partners in person, or a demand at the usual place of business of the partnership, is sufficient. *Story on Promissory Notes*, § 239.

The makers of the note in suit were partners, and it was made by them as such, in their partnership name; demand of payment was made on the proper day, of one of them in person, after the notary had, on the same day, gone to the last usual place of business of the partnership, for the purpose of making demand there, and found no one of the firm. The name of the firm was Bassett, Beecher, & Co.; and on the question's being asked Bassett, when a witness, "When did Bassett, Beecher & Co. stop business?" he replied, "They were thrown into bankruptcy in June, 1871." I think that we may infer from this that, by proceedings in the Bankrupt Court, the partnership was declared bankrupt, and its effects and affairs taken charge of by the officers of the law. The partners had separated, though there was no formal dissolution of their partnership by them. But bankruptcy of one member, or of all the members of a firm, works a dissolution of the copartnership. *Story on Partn.*, § 313.

On this state of facts and the law, it is contended by the learned counsel for the appellant that the demand for payment of the note should have been made of each of the former partners. He cites no authority for his position. I have been unable to find any. If, by the dissolution of the partnership by bankruptcy, and the separation of the partners, they must thereafter be treated as joint makers who are not partners, I think that the force of the authorities is that to charge an indorser of their note, a demand must be made of each of

¹ N. I. L. § 95.

² Id. § 94.

them, save where the other circumstances are such as to excuse a demand. For to charge the indorser of the note of joint makers, not partners, demand must be made on each. It was so held in *Union Bank v. Willis*, 8 Met. 504, which case was approved in *Arnold v. Dresser*, 8 Allen, 435. In *Willes v. Green*, 5 Hill, 232, Nelson, C. J., said it was so settled; *Harris v. Clark*, 10 Ohio, 5, is to the contrary, but that case is limited in *Greenough v. Smead*, 3 Ohio St. 415.

It is seen, therefore, that there is a distinction taken between the case of a note of joint makers who are not partners, and a note of partners who are still partners at the maturity of the note. That distinction rests upon the fact that partners are but one person, in legal contemplation; that each partner, acting in such capacity, is not only capable of performing what all can do, and of receiving and paying out that which belongs to all, but by such acts necessarily binds them all; that, as incident to such joint relations, all of the partners are affected by the knowledge of one. These things do not pertain to the relation of joint makers who are not partners. Hence, while a demand of [upon] one partner is equivalent to a demand of [upon] all, a demand of one of joint makers not partners is not. 8 Met., *supra*. And so a demand upon one partner is sufficient, because he represents the firm, and a dishonor by one is a dishonor by all, and each is presumed to have authority to act for the others; while in the case of a note of joint makers not partners, the indorser has a right to rely upon the responsibility of all and each, and may insist upon a dishonor by each. Story on Prom. Notes, § 255. So that the inquiry seems to be, whether a dissolution of a partnership, effected by the bankruptcy thereof, has so far changed the relations of the members of it as that the act or knowledge of one does not affect the rest. Undoubtedly a dissolution of partnership, however brought about, puts an end to certain of the joint powers and authority of all the partners. Perhaps it may be said that no one of the partners can do any act in any manner inconsistent with the primary duty of winding up the whole concerns of the copartnership. This is emphatically the case when the dissolution has been wrought by the bankruptcy of the firm, for then the effects thereof have passed into the control of the courts, and all payments therefrom or chargeable thereon are to be in the direction of the court, or according to its rules and practice. The principle on which a partner, during the existence of a partnership, may by his act bind his copartners, is that which governs the relation of agent and principal. The power of an agent to bind his principal ceases when the agency is ended; so that even payment by a former agent of a valid debt against his former principal gives him no right against the latter. The principle has not, however, been carried so far in the case of a copartner. His relations with the other members of the firm have not been entirely severed. He may, from his own means, pay a valid subsisting debt

against the copartnership, and have the right to claim an allowance therefor on the settlement of affairs, or contribution from the others. *Major v. Hawkes*, 12 Ill. 298. And a general statement has been made by a text writer of repute, that every act of administration which is necessary for winding up the concern may be effectually done by one partner, and the rest be bound. 2 Bell Comm. bk. 7, c. 2, p. 643, 5th ed. And the author expressly includes in this a case of dissolution by bankruptcy, though it is apparent that the property of a bankrupt concern may not be meddled with by one of its former members. But it is clear that the relations of the individual members of the firm are not, by a dissolution thereof, so completely severed as that no act of one can have any effect upon the others. *Robbins v. Fuller*, 24 N. Y. 570. Each and all have still an interest in the settlement of the affairs of the firm, in the payment of its debts, and the adjustment of the liability of each to it and to each other, and in the just division of any surplus.

Though the copartnership be insolvent, as in this case, and it be declared bankrupt, the members individually may be solvent, and liable to be affected by the final result of the bankrupt proceedings. And so there does, after a dissolution, still continue that common interest in past transactions, and in the present and future legitimate consequences therefrom, as that a joint power and authority in relation thereto continues; and while, after dissolution, no member of the late firm can by his act create a new liability against his former copartners (24 N. Y., *supra*), or bind them to an alleged liability (*Hackley v. Patrick*, 3 J. R. 536), or revive an extinct one (*Van Keuren v. Parmelee*, 2 N. Y. 523), he may do some acts which shall affect and be binding upon them, when such acts are confined to matters in which they all still have a common interest and are under a common liability. Thus it has been held that one who was once a member of a dissolved partnership which, in its lifetime, had indorsed a note in the firm name, might, after dissolution, waive demand of payment and notice of non-payment. *Darling v. March*, 22 Me. 184; which decision was put upon the principle that, though dissolution revoked all power to make a new contract, it did not revoke the authority to arrange those before created and yet subsisting. And it being so, that the act of one of former partners, in relation to a valid subsisting liability of the late firm does affect the others, and is taken as their act, and his knowledge thereof as their knowledge, there seems no reason why the refusal of one to pay, on demand, a note of the partnership should not be deemed the refusal of all, and all be chargeable therewith. And then, a demand of payment made to one is a demand of payment made to all, and is sufficient upon which to give notice of non-payment to their indorser.

And further in aid of this idea, it is to be remembered that the contract of the indorser of the promissory note of a copartnership is

that he will pay if the copartnership does not, while that of the indorser of the note of joint makers is that he will pay if neither of them does. One joint maker, not a partner of the other, may not be able to speak for the other as to his ability or disposition to protect his promise and to save his indorser from liability, while one partner, though the firm has been dissolved, is supposed to know and care as much as the other of its ability and willingness in those respects. Again, the purpose of demand and notice to the indorser is that he, knowing of the failure to pay by the copartnership, may be put at once on his guard, to save himself, if maybe, from loss. This end is achieved when one of former partners has refused to pay, as when all have. Taking all the reasons for the distinction made by the law between the case of a note of joint makers who are partners, and of that of joint makers who are not partners, and all the reasons for requiring a demand of payment of the maker, and notice thereof and of refusal to the indorser, in order to charge him, we are of the opinion that the rule that a demand of one copartner is sufficient, applies as well where the partnership has been dissolved as where it has not. It follows that the demand of payment in this case was sufficient. We find that this view is sustained in brief opinions in *Barry v. Crowley*, 4 Gill, 194; *Brown v. Turner*, 15 Ala. 832. . . .

[A question of the notice of dishonor, the court holding that it was sufficient.] The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

MAGRUDER *v.* THE UNION BANK OF GEORGETOWN.

Supreme Court of the United States, January, 1830. 3 Peters, 89.

When a negotiable instrument has been dishonored, notice of the dishonor must be given to an indorser to charge him with liability, even though he has *knowledge* of the dishonor.¹

THE case is stated in the opinion of the court.

[Argument not reported.]

MARSHALL, C. J. This action was brought by the Union Bank of Georgetown against George B. Magruder, as indorser of a promissory note made by George Magruder. The maker of the note died before it became payable, and letters of administration on his estate were taken out by the indorser. When the note became payable, suit was commenced against the indorser, without any demand of payment

¹ N. I. L. § 106.

other than the suit itself, without any protest for non-payment, and without any notice that the note was not paid, and that the holder looked to him as indorser for payment. Upon these circumstances the counsel for the defendant moved the court to instruct the jury that, before the plaintiff can recover in this action, it is essential for him to prove demand and notice to the indorser of the non-payment, which, not being done, the verdict should be for the defendant. But the court refused to give this instruction, and charged the jury that no demand or notice of non-payment was necessary. To this opinion, the counsel for the defendant in the Circuit Court excepted, and has brought the cause to this court by writ of error.

The general rule that payment must be demanded from the maker of a note, and notice of its non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited in support of it. The defendant in error does not controvert this rule, but insists that this case does not come within it, because demand of payment and notice of non-payment are totally useless, since the indorser has become the personal representative of the maker. He has not, however, cited any case in support of this opinion, nor has he shown that the principle has been ever laid down in any treatise on promissory notes and bills. The court ought to be well satisfied of the correctness of the principle, before it sanctions so essential a departure from established commercial usage.

This suit is not brought against George B. Magruder as administrator of George Magruder, the maker of the note, but against him as indorser. These two characters are as entirely distinct as if the persons had been different. A recovery against George B. Magruder, as indorser, will not affect the assets in his hands as administrator. It is not a judgment against the maker, but against the indorser of the note. The fact that the indorser is the representative of the maker does not oppose any obstacle to proceeding in the regular course. The regular demand of payment may be made, and the note protested for non-payment, of which notice may be given to him as indorser with as much facility as if the indorser had not been the administrator. It is not alleged that any difficulty existed in proceeding regularly; the allegation is that it was totally useless.

The note became payable on the 8th day of November, 1824. The writ was taken out against the indorser on the 26th day of April, 1825. If this unusual mode of proceeding can be sustained, it must be on the principle that, as the indorser must have known that he had not paid the note as the representative of the maker, notice to him was useless. Could this be admitted, does it dispense with the necessity of demanding payment? It is possible that assets which might have been applied in satisfaction of this debt, had payment been demanded, may have received a different direction. It is possible that

the note may have been paid by the maker before it fell due. Be this as it may, no principle is better settled in commercial transactions than that the undertaking of the indorser is conditional. If due diligence be used to obtain payment from the maker, without success, and notice of non-payment be given to him in time, his undertaking becomes absolute, not otherwise. Due diligence to obtain payment from the maker is a condition precedent, on which the liability of the indorser depends. As no attempt to obtain payment from the maker was made in this case, and no notice of non-payment was given to the indorser, we think the Circuit Court ought to have given the instruction prayed for by the defendant in that court.

The judgment is reversed and the cause remanded, with directions to award a *venire facias de novo*.

NOTE. — In *Yates v. Goodwin*, 96 Me. 90, "the defendant was treasurer of the corporation maker of the note, indorser on the note, and administrator of the estate of the owner of the note. He was, at that time, the person, as administrator, whose duty it was to demand payment of the note; he was the person, as treasurer, upon whom demand for payment should properly be made; and he was the person, as indorser, to whom notice of dishonor should be given, that is, notice of demand by himself, upon himself, for payment, and refusal by himself to pay himself. On Nov. 13, 1894, the defendant wrote upon the back of the note these words: 'Demand made for payment Nov. 18, '94.' The defendant testifies that no demand was actually made. But we think that the very act of the defendant in writing these words may properly be regarded as a demand by himself as administrator, upon himself as treasurer. The various entities of the defendant cannot be separated. It was his duty to make demand, and undoubtedly the writing of the words was to serve the purpose of a demand, as between Goodwin, treasurer, and Goodwin, administrator. It was to be understood that a formal demand had been made. That was equivalent to a formal demand. Moreover, Goodwin, indorser, was there also, and knew of the demand made. That was notice. Notice need not be in writing. It may be oral. . . . What the defendant knew as administrator and treasurer, he knew as indorser. He had no need to give himself further notice as indorser. To have gone through the form of so doing would have been silly and meaningless." Opinion of Mr. Justice Savage, p. 92. The plaintiff seems to have been an heir of Bryant, the payee and holder of the note which Goodwin had indorsed before delivery. (See N. I. L. § 81.) He brought suit against Goodwin as indorser, and the latter set up as a defence that he had had no notice of dishonor. It was held that he had notice and was liable.

But it seems that he had notice, not because he had knowledge of the dishonor, but because as administrator it was his duty to preserve the rights of his intestate, and hence to demand payment and notify indorsers of a dishonor; and that having made the demand, it was to be presumed that he was notified that he was looked to for payment as indorser. He would not be heard to say that he, as representative of the holder, did not look to himself as indorser for payment.

Cf. *Lysaght v. Bryant*, 9 C. B. 45, *ante*, p. 21.

MILLS v. BANK OF THE UNITED STATES.

Supreme Court of the United States, February, 1826. 11 Wheat. 431.

The notice should describe the instrument, and inform the indorser of the fact of dishonor, and that he is looked to for payment.¹

THE case is stated in the opinion of the court.

[Argument not reported.]

STORY, J. This is a suit originally brought in the Circuit Court of Ohio, by the Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for \$3600, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of *non assumpsit*, upon which issue was joined; and, upon the trial, the jury returned a verdict for the Bank of the United States, for \$4641, upon which judgment was rendered in their favor. At the trial, a bill of exceptions was taken by Mills, for the consideration of the matter of which the present writ of error has been brought to this court.

By the bill of exceptions, it appears that the evidence offered by the plaintiffs in support of the action "was, by consent of counsel, permitted to go to the jury, saving all exceptions to its competence and admissibility which the counsel for the defendant reserved the right to insist [upon] in claiming the instructions of the court to the jury on the whole case."

The plaintiffs offered in evidence a promissory note, signed Wood & Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair, and Horace Reed, as successive indorsers, which note, with the indorsements thereon, is as follows, to wit: "Chillicothe, 20th July, 1819. \$3600. Sixty days after date, I promise to pay to Peter Mills, or order, at the office of discount and deposit of the Bank of the United States, at Chillicothe, \$3600, for value received. Wood & Ebert." Indorsed, "Pay to A. Adair, or order, Peter Mills." "Pay to Horace Reed, or order, A. Adair." "Pay to the President, Directors, and Company of the Bank of the United States, or order, Horace Reed." On the upper right-hand corner of the note is also indorsed: "3185. Wood & Ebert, \$3600, Sept. 18-21." It was proven that this note had been sent to the office at Chillicothe, to renew a note which had been five or six times previously renewed by the same parties. It was proven, by the deposition of Levin Belt, Esq., Mayor of the town of Chillicothe, that, on the 22d September, 1819, immediately after the commencement of the hours

¹ N. I. L. §§ 112, 113.

of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note; but there was no person there ready or willing to pay the same, and the said note was not paid; in consequence of which the said deponent immediately protested the said note, for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately, on the same day, deposited one of said notices in the post-office, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy: "Chilicothe, 22d of September, 1819. Sir: You will hereby take notice that a note, drawn by Wood & Ebert, dated twentieth day of September, 1819, for \$3600, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chilicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you. Yours respectfully, Levin Belt, Mayor of Chilicothe." (Peter Mills, Esq.) It was further proven by the plaintiffs that it had been the custom of the banks in Chilicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange, on the day after the last day of grace (that is, on the sixty-fourth day); that the branch bank, on its establishment at Chilicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place ever since. No evidence was given of the handwriting of either of the indorsers. The court charged the jury: 1. That the notice, being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that a demand had been made at the bank when the note was due; 2. That, if the jury find that there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by defendant, except the note in controversy, the mistake in the date of the note, made by the notary in the notice given to that defendant, does not impair the liability of the said defendant, and the plaintiffs have a right to recover; 3. That, should the jury find that the usage of banks, and of the office of discount and deposit in Chilicothe, was to make demand of payment and to protest, and give notice on the sixty-fourth day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the court to instruct the jury "that, before the common principles of the law relating to the demand and notice necessary to charge the indorser can be varied by a usage and custom of the plaintiffs, the jury must be satisfied that the defendant had personal knowledge of the usage or custom at the time he indorsed the note; and also that, before the plaintiffs can recover as the holder and indorser of a promissory note, they must prove their title to the proceeds by evidence of the indorsements on the note," which instructions were refused by the court.

Upon this posture of the case, no questions arise for determination here, except such as grow out of the charge of the court, or the instructions refused on the prayer of the defendant's counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

The first point is, whether the notice sent to the defendant at Chilicothe was sufficient to charge him as indorser. The court was of opinion that it was sufficient, if there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant.

It is contended that this opinion is erroneous, because the notice was fatally defective, by reason of its not stating who was the holder; by reason of its misdescription of the date of the note; and by reason of its not stating that a demand had been made at the bank when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct, and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser who is the holder, as he is equally bound by the notice, who-soever he may be; and it is time enough for him to ascertain the true title of the holder when he is called upon for payment.

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the parties, the time and place of payment, and the indorsement, were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed that, on the 22d September, a note indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note payable in the office of Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?

The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note,¹ and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general if not universal practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment.

Upon the point then, of notice, we think there is no error in the opinion of the Circuit Court.

GILBERT *v.* DENNIS.

Supreme Court of Massachusetts, March, 1842. 3 Met. 495.

But mere notice of non-payment, which does not express or imply demand and dishonor, is not such notice as will render the indorser liable.²

ASSUMPSIT by indorsee against the indorser of a negotiable promissory note. The note was payable generally. Payment at maturity having been refused, the holder caused notice to be left at the defendant's dwelling-house, which stated that the note "is due this day and unpaid." Defence, that the notice was not good. The judge ruled that it was good, but reserved the question for the whole court.

[Argument not reported.]

SHAW, C. J. . . . [A question of the presentment.*] No particular form of notice is necessary. It may be either written or verbal. *Tindal v. Brown*, 1 T. R. 167. Nor will a mistake or misdescription of the note render the notice insufficient, if on the whole it cannot mislead the indorser, and if it so designates and distinguishes the note as to leave no reasonable doubt in the mind of the indorser what note was intended, and that it was the same with the note in suit. *Smith v. Whiting*, 12 Mass. 6; *Bank of United States v. Carneal*, 2 Peters, 543.

But though no special form of notice is requisite, still in some form

¹ This is to be taken in connection with the facts before the court, to wit, that the instrument was payable at the bank. See explanation of this statement in *Gilbert v. Dennis*.

² N. I. L. § 113.

³ See *post*, p. 306.

the fact to be notified is that the note is dishonored by the default of the promisor; and this may be done verbally or in writing, in any language which communicates the information to the indorser, in terms, or by reasonable implication. Indeed, the same formula, in terms, may communicate this information or not, according to circumstances. Suppose a note payable at a bank, in terms, or by the agreement of parties, or tacit agreement arising from usage or otherwise; it is the duty of the promisor to pay it at such bank on the last day of grace. The dishonor of such note by the promisor consists in the non-payment at the bank. If then, after the time of payment has elapsed, notice be given to the indorser that the note is unpaid, it is notice that it is dishonored; whereas, in case of a private holder, in regard to a note which requires presentment and demand to fix the holder with a default, notice, in the same words, that the note is unpaid would not necessarily imply that it was dishonored, because that fact might be strictly true, though the note had never been presented, nor presentment waived or excused.

But whatever may be the form of the notice, whether written or verbal, we think the result of the decided cases is this: that the notice should be such that it will inform the indorser that the notice has become due and been dishonored, and that the holder relies on the indorser for payment; that this information may be express, or may be inferred by necessary implication, or reasonable intendment from the language; construing such language in reference to its accustomed meaning, when applied to similar subjects, and with reference to the terms of the note, the time and place at which the note is to be paid as fixed by express or tacit agreement, or inferred from general or particular usages. It is not necessary to inform the indorser of the time, place, or mode of presentment and demand, nor the means by which it was dishonored, nor matter of excuse or waiver. Whatever legally fixes the promisor with dishonor is sufficient, on due notice given, to charge the indorser. If, for instance, the promisor had absconded before the note is due, without having made provision for its payment, so that no presentment and demand can be made, that is a dishonor, of which the holder may, immediately after the note has become due, notify the indorser; or if the promisor has agreed that notice left at a particular place shall be deemed a good substitute, and notwithstanding notice is so left he does not make payment, this is likewise a dishonor.

But, without considering further what constitutes a dishonor, it may be useful to examine more particularly, in reference to the present case, the authorities in relation to the effect and purport of the notice to be given to an indorser. The rule is laid down in general terms by the text-writers, that notice is to be given of the fact of dishonor. Bayley states the duty of the holder. He is under an implied undertaking to every party to the bill or note, who would be entitled

to bring an action on paying it, to present, in proper time, the one for acceptance and each for payment; to allow no extra time for payment, and to give notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment. Bayley, Bills, 1st Am. ed. 124.

In general, it is incumbent on the holder to give notice of the dishonor to those persons to whom he means to resort for payment; otherwise they will be discharged. Chitty, Bills, 393.

In *Tindal v. Brown*, 1 T. R. 167, and 2 T. R. 186, note, it was held that no particular form of notice was necessary, but that such notice must come from the holder of the bill or note, or some party to it; and that mere knowledge of the fact of non-payment, coming to the indorser from any other source, would not be sufficient. It ought to purport that the holder looks to him for payment. The court do not say, in terms, that the notice must directly, or by implication, state the fact of dishonor, but it is implied. The case decides that the holder must do an act, electing to assert his right to recover the note of the indorser, which right can only exist in case of a dishonor of the promisor. The case did not call for a decision as to what must be the tenor or purport of the notice, as to the fact of dishonor. It ought, said Mr. Justice Buller, to purport that the holder looks to him (the indorser) for payment. In regard to this, it may be remarked that, when notice is given by the holder to the indorser of the dishonor of a note, it necessarily implies that he looks to him for payment. That is the natural, and may in general be regarded as the necessary, inference from the fact of giving such notice.¹

This question seems not to have arisen in England until a recent period; but, since the point has been started, there has been a series of decisions on the subject. The first was *Hartley v. Case*, 4 Barn. & C. 339; s. c. 6 Dowl. & Ryl. 505. The notice from the holder was: "I am desired to apply to you for the payment of the sum of £150, due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." The court held it insufficient, because it did not apprise the party of the fact of dishonor. They said, the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. This was in 1825.

The next case was that of *Solarte v. Palmer*. On a trial before Lord Tenterden, he expressed an opinion that the notice was insufficient. A bill of exceptions was taken, and the case brought before the Exchequer Chamber, who confirmed the decision. 7 Bing. 530; 5 Moore & P. 475; 1 Crompt. & J. 417; 1 Tyr. 371. On appeal to the House of Lords, the judgment was affirmed. 8 Bligh, N. R. 371, 874; s. c. 2 Cl. & Fin. 93; 1 Bing. N. R. 194; 1 Scott, 1.

¹ See *Fitchburg Ins. Co. v. Davis*, 121 Mass. 121, post, p. 261.

The action was brought by the assignees of a bankrupt, and the notice was given by the attorneys of the assignees. It described the bill, and stated that it had been put into their hands by the assignees, with directions to take legal measures for the recovery thereof, unless immediately paid.

In giving judgment in the Exchequer Chamber, Tindal, C. J., states the rule to be, that the notice does not require the formality of a regular protest, but it should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment. This was decided in the House of Lords, June, 1834.

The next case, I believe, is that of *Bolton v. Welsh*, 3 Bing. N. R. 688; s. c. 4 Scott, 425. The notice to the indorser was thus: "The promissory note for £200, drawn by, etc., dated 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount thereof forthwith." It was strongly urged that the words *returned unpaid* would import to the understanding of mercantile men that the note had been dishonored. But the court held themselves bound by the case of *Solarte v. Palmer*, and believing this case to be within it, held the notice insufficient, although all the judges expressed their regret at the result. But they state the rule of law, as it had before been stated, that the notice should show a presentment to the maker, a demand of payment, and a refusal. As to anything further than the general rule, this case is of no authority, unless in a case where the form of notice is precisely the same. Whether in such case the words *returned unpaid* would import the fact of dishonor would depend much upon the usage of each mercantile community in which they should be used, and the conventional use and meaning of particular forms of expression used in such community. This was a decision of the Court of Common Pleas, Easter Term, 1837.¹

About the same time was decided, in the Court of Exchequer, the case of *Hedger v. Steavenson*, 2 Mees. & W. 799, where the attorney addressed a letter to the defendant, informing him that his note (describing it) became due the day before, and had been returned unpaid, and requested him to remit the amount, with 1s. 6d. noting; and the notice was held to be good.

The case of *Messenger v. Southey*, 1 Man. & G. 76, and 1 Scott, N. R. 180, was decided in the Court of Common Pleas, in 1840. The notice was as follows: "This is to inform you that the bill I took of you for £15 2s. 6d. is not took up, and 4s. 6d. expense; and the money I must pay immediately." Held, it was insufficient, be-

¹ *Boulton v. Welsh* was overruled in 1842 by *Robson v. Curlewis*, 2 Q. B. s. c. Car. & M. 378.

cause it did not state or intimate, by intelligible inference, that the note had been dishonored.

About the same time, the case of *Lewis v. Gompertz*, 6 Mees. & W. 399, came before the Court of Exchequer. The notice from the holder to the indorser stated that the bill bearing his indorsement had been presented to the acceptor, and returned dishonored, "and now lies overdue and unpaid with me, as above, of which I give you notice." This was held sufficient, as giving all the requisite information, although it did not, in terms, require payment of the indorser.

The remarks of Mr. Baron Parke, in this case, are well worthy of consideration, as showing the extent to which the court considered the authority of *Solarte v. Palmer* as going, and the qualifications with which it is to be taken.

In *Grurgeon v. Smith*, 6 Adol. & Ellis, 499, the notice to the drawer of a bill was that the bill had been returned with charges; and the immediate attention of the drawer to it was requested. This was held sufficient, as implying a demand and refusal, and noting for non-payment.

See *Houlditch v. Cauty*, 4 Bing. N. R. 411; s. c. 6 Scott, 209; *Strange v. Price*, 10 Adol. & Ellis, 125; *Burgh v. Legge*, 5 Mees. & W. 418; *Shelton v. Brothwaite*, 7 Mees. & W. 436; *Cooke v. French*, 3 Per. & D. 596; s. c. 10 Adol. & Ellis, 131, note.

These are all recent cases, bearing more or less directly upon the question, but do not essentially vary the result. Where, in the notice, it is stated that the bill has been noted or returned with charges of protest, or the like, it is held to be notice, by reasonable implication of the fact of dishonor.

It was contended at the argument that although it has been settled by recent authorities in England that the notice to the indorser must state the fact of dishonor, yet that the American authorities would show that it was unnecessary. It becomes, therefore, necessary to examine and compare them.

Mills, in error, v. U. S. Bank, 11 Wheat. 431.¹ The note was in terms payable at the branch of the U. S. Bank at Chilicothe, and indorsed by the original defendant, plaintiff in error. It was demanded at the proper time at the bank, but there being no person there ready and willing to pay the same, it was immediately protested, and notice given to the defendants. The notice described the note by the date and amount, the time and place of payment, and as a note on which the defendant was indorser, and stated thus: "which has been protested for non-payment, and the holders thereof look to you." (Signed by the Mayor of Chilicothe acting as notary, and addressed to the defendant.) It was objected that the notice was defective, because it did not state who was the holder; because there was a misdescription of the date; and because it did not state that a demand

¹ *Ante*, p. 251.

had been made at the bank, when the note was due. As to the misdescription, it was held to be of no importance, if there was no other note to which it could apply, if it was so described as to indicate the note in suit, and if it did not mislead.

As to the sufficiency of the notice, the opinion was delivered by Mr. Justice Story. Some particular expressions, taken alone, would seem to warrant the position for which it is cited. But taking the whole together, and in reference to the case then before the court, we think it is not opposed to the rule as stated in the English cases. Speaking in reference to the first objection, that the notice did not state who was the holder, the judge says: "No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker; that he is considered liable; and that payment is expected of him."

In reference to the objection that it did not state that payment was demanded at the bank when the note became due, he says: "It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity." He then speaks of the fact of presentment and demand as matter of fact to be proved, and adds: "A statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded on his having complied with the requisitions of law against the indorser." One of these requisitions is, of course, presentment and demand. And the learned judge concludes, upon this point, by adding that, "in point of fact, the general if not universal practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment."

In the case then before the court, the notice contained a full and precise statement of the presentment, demand, and non-payment by the maker. The objection with which the court were dealing was, that the notice did not specify the time and place of demand. The answer made was, that such particularity was unnecessary, and that it is sufficient that it states the fact of non-payment. Applied to the facts of that case, it may be construed to mean non-payment after due presentment. So, when the learned judge speaks of the practice of commercial cities, he speaks of notice of the mere naked non-payment, in contradistinction to stating, in the notice, the mode and place of demand. That such is the meaning may be inferred from the passage before cited, in which he speaks of the object of the notice, which is to inform the indorser that payment has been refused by the maker. Refusal implies non-payment on demand, or under such circumstances as render a presentment and demand unnecessary. Indeed, in many cases, simple notice of non-payment is notice of dishonor; as where the note is in terms, or by usage or special agree-

ment, payable at a bank, a notice stating the date and terms of the note, showing that it has become due, and averring that it is unpaid, is equivalent to an averment that it is dishonored.

In *Smith v. Whiting*, 12 Mass. 6, no question was raised as to the sufficiency of the notice. It was notice from a bank. It described the note as due and unpaid; and by usage it was held to be payable at the bank. Of course it was dishonored, by not being paid at the bank by the maker.

So in *State Bank v. Hurd*, 12 Mass. 172, notice was left at a place agreed by the parties as a substitute for notice at the house or place of business of the maker; and it was held sufficient, being equivalent to a more formal demand; and failure of the promisor to pay, on such notice, rendered the indorser liable.

The case of *Bank of Rochester v. Gould*, 9 Wend. 279, is a case of mere misdescription. The notice to the indorser stated expressly that the note had been protested for non-payment; and the only question was, whether it was well described. It therefore does not affect the present question.

We have thus attempted, at the risk of being somewhat tedious, to ascertain what is the rule upon this subject, on account of the extreme importance of certainty and uniformity in the rules of law applicable to the rights and duties of holders and other parties to notes and bills of exchange. And we take that rule to be, that as an indorser is liable only conditionally for the payment, in case of a dishonor of the note at its maturity by the maker and notice thereof to the indorser, in order to charge him, notice of such dishonor must be given him by the holder or his agent, or some party to the bill; that mere notice of non-payment, which does not express or imply notice of dishonor, is not such notice as will render the indorser liable.

In order to apply the rule thus stated to the present case, it will be necessary to look at the facts stated in the report. It appears that the presentment and demand on the promisor were made on the morning of the day on which the note fell due. Afterwards, at about eleven o'clock, the plaintiff caused a written notice to be left at the defendant's dwelling-house, of which the following is a copy: "Boston, May 4, 1838. Mr. Louis Dennis. Sir,—I have a note signed by C. E. Bowers and indorsed by you for seven hundred dollars, which is due this day and unpaid; payment is demanded of you. C. C. Gilbert."

This notice comes from an individual, not from a bank. It was delivered at eleven A. M. There would then be no default and no dishonor, unless a demand had been made on the promisor. An averment, therefore, that it was unpaid did not, by necessary implication or reasonable intendment, amount to an averment or inti-

mation that payment had been demanded and refused, or that the note had been otherwise dishonored. The court are therefore of opinion that the notice was not sufficient to render the indorser legally liable.

FITCHBURG INSURANCE COMPANY *v.* DAVIS.

Supreme Court of Massachusetts, October, 1876. 121 Mass. 121.

If, however, the notice is given by the holder, it is unnecessary that it contain a statement that the indorser is looked to for payment; such fact would be implied from the giving of the notice.¹

CONTRACT to recover an instalment of \$50, due May 30, 1874, and interest, against the indorser of the following promissory note, signed by Honora May and William May: "\$1035.20. Fitchburg, November 30th, 1869. For value received I promise to pay John E. Davis, or his order, one thousand and thirty-five dollars and twenty cents as follows, to wit: fifty dollars at the expiration of three months from the date hereof, and fifty dollars at the expiration of each and every three months thereafter until the whole sum of ten hundred and thirty-five dollars and twenty cents is paid, with interest on the whole sum, at the rate of seven per cent, payable semi-annually." Trial in the Superior Court, before PUTNAM, J., without a jury, who allowed a bill of exceptions in substance as follows:

The making of the note and of the indorsement were admitted. It appeared in evidence that a demand was made upon the makers for the payment of the said instalment, and notice of its non-payment seasonably given to the defendant on June 2, 1874. This demand, however, was for the payment of said instalment, and interest then due upon the said note (some of the previous instalments and interest not having been paid), and the notice given to the defendant stated that such had been the demand, and that the holders looked to him for the payment of said instalment and the interest due upon the note. The defendant had never been legally notified of the non-payment of such previous instalments.

The defendant contended that the whole notice was invalidated by reason of its including notice of a demand for more than the indorser was liable to pay; but the judge ruled that as the makers were liable for the whole, the demand was good, and that the notice was not wholly invalidated by reason of the demand covering more than the indorser was legally liable to pay, and found that the indorser was properly notified.

It appeared in evidence that previous instalments and the interest upon the note, according to its terms, had not been paid

¹ See *Furze v. Sharwood*, 2 Q. B. 388.

except as by the indorsement of the proceeds of the sale of property, as hereinafter stated; that no notice of their non-payment was given to the defendant until, and except the notice of June 2, 1874, being the notice hereinbefore referred to, and the defendant contended that such want of notice for so long a period — the plaintiff holding collateral security — was, under the circumstances, such a dishonor of the note and the instalment sued for as would discharge him as indorser; but the judge ruled that the defendant was not discharged thereby, so far as the amount of the instalment sued for and interest due thereon were concerned.

It appeared that the makers of the note had given to the defendant, at the time of the making thereof, a mortgage of land, to secure its payment, and that the defendant had assigned this mortgage to the plaintiff, on May 2, 1870, at the time when he transferred to it the note.

On April 24, 1874, the real estate was sold at public auction, by virtue of a power of sale in the mortgage, and for a breach of the condition thereof, for the sum of \$995, and, after deducting the charges and expenses of the sale, the net amount of \$970 was indorsed upon said note on May 2, 1874, and applied towards the payment of all of said note then due and unpaid. This application left the instalment now sued on still due and unpaid. The defendant contended that this application was illegal and that the plaintiff had no right to appropriate it in such a way as to cover instalments the non-payment of which he had not been notified of; but the judge ruled otherwise, and found for the plaintiff, in the sum of \$54.25, being the instalment sued for and interest from June 2, 1874; and the defendant alleged exceptions.

[Argument not reported.]

GRAY, C. J. By the non-payment of the previous instalments as they fell due, the whole note was dishonored, and subjected to all the defences which existed against it when the holder took it. *Vinton v. King*, 4 Allen, 562.¹ But the omission to give the indorser notice of the non-payment of those instalments does not affect his liability for a later instalment, of the non-payment of which he has been duly notified.

Notice that payment has been demanded of and refused by the maker is sufficient to charge the indorser, without any express demand upon him. *Lewis v. Gompertz*, 6 M. & W. 399; *King v. Bickley*, 2 Q. B. 419; *United States Bank v. Carneal*, 2 Pet. 543. The demand made in this case upon the makers for the payment of the instalment now sued for, and of the interest then due upon the note (some of the previous instalments and interest being still

¹ *Ante*, p. 239.

unpaid), included nothing for which the makers were not liable. The notice to the indorser of that demand upon the makers, and of their non-payment, was sufficient to charge the indorser, and was not invalidated by adding that the holder looked to him for the payment of this instalment and of the interest due upon the note. The indorser was certainly liable for the instalment in question, and for interest upon so much of the principal as had not yet become due; and whether he was liable for the whole interest is immaterial.

The plaintiff had the right to apply, to the payment of the previous instalments, the proceeds of the mortgage given by the maker to secure the payment of the note. *Blackstone Bank v. Hill*, 10 Pick. 129, 133; *Saunders v. McCarthy*, 8 Allen, 42; *Draper v. Mann*, 117 Mass. 439.

Exceptions overruled.

CHAPMAN v. KEANE.

King's Bench of England, Easter, 1835. 3 Ad. & E. 193.

The notice may be given by the holder, or by any party to the instrument, whose liability has been duly fixed; and who, on taking up the instrument would have a right of reimbursement thereon against the party notified.¹ Notice given by a party entitled to give it, enures for the benefit of the holder.²

ASSUMPSIT by indorsee against drawer of a bill of exchange, averring in the usual form presentment to the drawee, non-payment by him, and notice to the defendant. Plea, that the defendant had not due notice of non-payment by the drawee, tendering issue thereon. Joinder.

On the trial before Tindal, C. J., at the Guildford Summer assizes, 1834, it appeared that the plaintiff had indorsed the bill, before it was due, to one Wiltshire, who left it with the plaintiff's clerk in order that it might be presented at maturity to the drawee. It was dishonored upon presentment; whereupon the plaintiff's clerk gave notice to the defendant. The notice was regular in all respects except that the clerk gave it in the name of the plaintiff, the indorsee, and not of Wiltshire. The plaintiff afterwards took up the bill from Wiltshire. It was objected that the notice ought to have been given by the holder of the bill, whereas the holder, at the time of the notice, was Wiltshire. His lordship, being of the same opinion, nonsuited the plaintiff. In Michaelmas term last, Law obtained a rule to show cause why the nonsuit should not be set aside and a verdict entered for the plaintiff.

[Argument reported.]

¹ N. L. L. § 107.

² Id. § 110, cf. § 109.

Lord DENMAN, C. J. On the trial of this action by the indorser against the drawer of a bill of exchange the Lord Chief Justice of the Common Pleas directed a nonsuit, for want of due notice of dishonor. The bill had been indorsed by the plaintiff, by the desire of Wiltshire, who had discounted it and left it in the hands of the plaintiff's clerk with instructions to obtain payment or give notice of dishonor. He did give notice to the defendant, but in the name of the plaintiff, not in that of Wiltshire, the then holder, who had deposited the bill with him.

The objection to the plaintiff's recovery was founded on the case of *Tindal v. Brown*, 1 T. R. 167, s. c. 2 T. R. 186, in which all the judges except Lord Mansfield considered a notice by one who was not the holder as no notice, on the ground that the drawer was not thereby appraised of the holder's intention to look to him for payment; and this case was distinctly recognized, and its principle adopted, by Lord Eldon in *Ex parte Barclay*, 7 Ves. 597.

Notwithstanding these high authorities, it is clear from *Jameson v. Swinton*, 2 Camp. 373, *Wilson v. Swabey*, 1 Stark. 34, and also, from the learned treatises on bills of exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice given in due time by any party to it. In the *nisi prius* cases just referred to no express allusion was made to *Tindal v. Brown* or *Ex parte Barclay*; but we can hardly conceive that they were not present to the recollection of Lord Ellenborough and Mr. Justice Lawrence or the counsel engaged. These learned judges, indeed, decided them at *nisi prius*, but without question. We are now compelled to determine whether the case of *Tindal v. Brown*, as to this point, be good law. We think that it is not. If it were, the holder might secure his own right against his immediate indorser by regular notice; but the latter, and every other party to the bill, would be deprived of all remedy against anterior indorsers and the drawer, unless each of those parties should in succession take up the bill immediately on receiving notice of dishonor, a supposition which cannot be reasonably made. We may add that this point was not necessary for the decision of the case, as this court, including Lord Mansfield, granted a new trial on a different ground.

Rule absolute.

NOTE. — At the time when this case was decided, the principal controversy seems to have been, whether notice could be given by any one other than the holder or his agent. The decision in *Chapman v. Keane* was that it could be given by any party to the instrument; the question whether it was necessary that the liability of such party should be fixed before he became entitled to give notice was not adverted to by the court or by counsel. It is settled, however, that notice can be given only by one whose liability is fixed, other

than the holder. *Lysaght v. Bryant*, 9 C. B. 45; *Bigelow, Bills and Notes*, 143, 144; *Harrison v. Roscoe*, 15 M. & W. 231; N. I. L. §§ 107, 110; *Tindal v. Brown*, *supra*.

BANK OF THE UNITED STATES *v.* DAVIS.

Supreme Court of New York, May, 1842. 2 Hill, 451.

Or, the notice may be given by an agent,¹ who may notify the prior parties, or he may give notice to his principal, who will have the same time in which to forward notice, as if his agent were an independent holder.²

ASSUMPSIT by the holder against the drawer and indorsers of three bills of exchange, drawn by Davis upon and accepted by one Holden, and indorsed by the other defendants. The bills were payable at the Merchants' Bank in the city of New York.

The bills were indorsed for collection by the cashier of the plaintiff bank and transmitted to a notary in New York, who, upon the day of maturity, presented them at the Merchants' Bank for payment, and, payment being refused, protested them and mailed notices of dishonor, addressed to the drawer and indorsers, enclosed in an envelope and directed to the cashier of the plaintiff bank. The cashier received the notices in due course of mail, and immediately forwarded the notices to the drawer and indorsers.

The defendants contended that they were not liable for want of proper notice of dishonor; but the court ruled that the notice, if given as stated above was sufficient to entitle the plaintiff to recover. The defendant excepted to this ruling.

[Argument not reported.]

NELSON, C. J. The certificates of the notary were properly received as evidence of demand and protest of the first two bills; and, under our statutes, Sess. Laws of 1833, p. 395, § 8, see also 2 R. S. 212, § 46, 2d ed., I am inclined to think they were also evidence of notice to the cashier of the bank at Erie, the last indorser upon the paper.

The act referred to allows such proof of the service of notice upon any or all of the parties to the bill or note, the certificate specifying the mode of giving it. The only doubt upon the point is, whether the cashier of the bank at Erie, having indorsed the paper simply for the purpose of collection, should be regarded as a party, within the meaning of the statute. The case is directly within its terms, as the indorsement is in the usual way, and, it may fairly be presumed, was made in behalf of the bank for the purpose of indicating

¹ N. I. L. § 108.

² Id. § 111.

to its correspondent in New York the expectation that notice should be sent to it in that character. I think the face of the paper should be allowed to govern the question, rather than the particular character that may be given to it, as between the parties, by extrinsic evidence. Every exception made to a general commercial rule concerning negotiable paper, which enters so extensively into the business transactions of the country, is calculated to embarrass its circulation, and endanger its security and usefulness. This construction will in no respect operate to the prejudice of any party liable upon the paper, whether drawer or indorser, as will be seen upon a further examination of the law.

It is perfectly clear, where a bill or note is sent by the holder to his agent for him to receive payment, and he gives due notice to the principal of its dishonor, that prompt notice from the latter will be in time to charge the prior parties; though if it had been sent directly by the agent, the notice would have reached there much sooner. Chitty on Bills, 520, 1, 9th Am. from 8th Lond. ed.; Bayley on Bills, 174. The case of *Mead v. Engs*, 5 Cowen, 303, is a clear authority for this doctrine, and comes fully up to the case under consideration, and to the view we have taken of the statute. There, the holder in New York sent the bill to a bank at Providence for collection, whence it was sent to another bank at Bristol (R. I.), where the acceptor resided. The notary there, after making demand and protest, returned the bill to the cashier of the Bristol Bank, who sent it by the next mail to the cashier of the Providence Bank, and the latter sent it by the next mail to his immediate indorser in New York. The objection was taken, that the notary should have given notice of non-payment directly to all the prior parties; but the court held it to have been given according to established commercial usage. It was also decided in that case, that one to whom a bill or note is indorsed merely as agent to collect, is a holder for the purpose of giving and receiving notice of non-payment; and is not bound to give notice directly to all the prior parties, but may content himself by notifying his immediate indorser, who is bound to give notice to his indorser, etc. in the same manner as if the bill or note had been negotiated to the agent for a valuable consideration. Upon this view of the case, therefore, the cashier of the Erie bank is to be regarded as a party to the paper for all purposes of receiving and giving notice to charge the prior parties; and if so, not only have the proper steps been taken to charge the defendants, but the case is directly within the act of 1833, which makes the certificate evidence of the notice given by the notary.

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New trial granted.

SHOENBERGER v. THE LANCASTER SAVINGS
INSTITUTION.

Supreme Court of Pennsylvania, 1857. 28 Penn. St. 459.

If at maturity the indorser is dead, notice may be given to his personal representative.¹

ACTION upon several negotiable promissory notes indorsed by the defendants' testator. The defendants were named (with others) as executors in the testator's will, but did not qualify or act as such. After the present action, but not before, they renounced (the others having qualified under) the appointment made by the testator. The notes were dishonored at maturity and two of the defendants were in due season notified of the fact. Judgment for the plaintiffs. Writ of error, on the ground that the notice of dishonor to the defendants was insufficient to bind the testator's estate.

[Argument reported.]

LOWRIE, J. The office of executor in Pennsylvania is of course very analogous to the office of executor in England, but their duties are not identical; and we always run the risk of error if we take counsel from English analogies and overlook the instructions of our own statutes. At death a man's estate really passes into the hands of the law for administration, as much when he dies testate as when intestate; except that, in the former case, he fixes the law of its distribution after payment of debts, and usually appoints the persons who are to execute his will. But even this appointment is only provisional, and requires to be approved by the law before it is complete; and therefore the title to the office of executor is derived rather from the law than from the will.

The law, however, allows a man to appoint his executors subject to this approval, and treats them, when appointed, as entitled to the office until they renounce it, if they are not legally incompetent to fill it. If they are competent, their appointment avails to make them representatives of the estate so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note; for they have immediate power to qualify themselves to act if they choose, and if the occasion demands it.

When the notices in this case were served, the two persons named as executors and to whom notice was given, had power to take the oath and the office of executors, and might have done so the next hour afterwards. The law allowed the testator to appoint them, and he did so, and they may be treated as representing his estate for the purpose of such notice, unless they renounced at the register's office,

¹ N. I. L. § 115.

or at least until they refuse the notice on the ground that they do not intend to serve. He who is bound to give such notice is not in fault in giving it to one who is thus potentially an executor, even though others have already become so actually by taking the oath of office, unless at least he is warned that such notice is not accepted. If the estate suffers from such a notice, it is not the fault of him that gave it.

It was not erroneous to give the notice on the 4th of July, for a statute expressly allows this.

Judgment affirmed.

MUNN *v.* BALDWIN.

Supreme Court of Massachusetts, March, 1810. 6 Mass. 315.

The notice may be sent personally or by mail.¹ In the latter case, by custom, notice is deemed to have been given when the notice is duly addressed, and deposited in the post-office.²

ASSUMPSIT upon a bill of exchange drawn in Boston on Justin Smith, of Philadelphia, in favor of the defendants, and by them indorsed to the plaintiff.

The facts (agreed) were, that the notary in Philadelphia, who protested the bill for non-payment, on the day of the protest, or on the morning of the next day, before the mail for Boston was closed, put a letter into the post-office in Philadelphia directed to the defendants in Boston, and containing the necessary notice; but the case adds: "It does not appear that the defendants ever received that letter."

[Argument reported.]

PARSONS, C. J. The only question in this action is, whether the defendants had legal notice of the protest for non-payment of the bill of exchange. After taking a little time to advise, we are all of opinion that the notice is *prima facie* sufficient. The holder of the bill made use of the usual mode of conveying notice, by putting the letter containing it into the post-office; and a mode to which the indorsers must be considered as assenting, or the negotiating of bills payable at a distance would be greatly embarrassed, if not obstructed. For who would buy a bill, to be presented for payment in a remote part of the United States, if it was to be understood that if not paid, he must be at the expense of some private messenger, whose accidental sickness or detention on the road would defeat his remedy?

¹ N. I. L. § 113.

² Id. §§ 122, 123.

When a letter is put into the regular post-office, we presume that it was sent and received agreeably to its direction, unless the contrary is proved. Here there is no evidence on that point; the case only stating, that it does not appear that the letter was received by the defendants; and yet they might, in fact, have received it. If it was agreed that the letter miscarried, and that the defendants did not receive it, it might be a question at whose risk the letter was sent by the mail; and whether, the regular mail being the method of conveyance assented to by the defendants, they must not be answerable for the miscarriage, in the same manner as if a letter sent by their private servant had not been delivered by him. On this last point, however, it is not necessary now to decide. But on the facts stated, we are satisfied that the notice must be considered as sufficient to make the indorsers liable, and that the plaintiff ought to recover.

Therefore, conformably to the agreement of the parties, let the defendants be called.

BANK OF ALEXANDRIA v. SWANN.

Supreme Court of the United States, January, 1835. 9 Peters, 33.

Where the person giving and the person to receive notice reside in different places, the notice must be deposited in the post-office in time to be sent by mail on the day succeeding that of dishonor.¹

THE case is stated in the opinion of the court.

[Argument not reported.]

THOMPSON, J. This suit was brought in the Circuit Court of the District of Columbia, for the County of Alexandria, upon a promissory note made by Humphrey Peake, and indorsed by the defendant in error. Upon the trial the jury found a special verdict, upon which the court gave judgment for the defendant, and the case comes here upon a writ of error.

The points upon which the decision of the case turns resolve themselves into two questions:

1. Whether notice of the dishonor of the note was given to the indorser in due time;
2. Whether such notice contained the requisite certainty in the description of the note.

The note bears date on the twenty-third day of June, 1829, and is for the sum of \$1400, payable sixty days after date at the Bank of Alexandria. The last day of grace expired on the 25th of August,

¹ N. I. L. § 121. Cf. § 120, as to time of sending notice when the parties reside in the same place.

and on that day the note was duly presented, and demand of payment made at the bank, and protested for non-payment; and on the next day notice thereof was sent by mail to the indorser, who resided in the city of Washington.

The general rule, as laid down by this court in *Lenox v. Roberts*, 2 Wheat. 373, 4 Cond. 163, is, that the demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds, that according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half-past eight o'clock P.M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day, at any time after eight o'clock A.M., and it is argued on the part of the defendant in error, that as demand of payment was made before three o'clock P.M., notice of the non-payment of the note should have been put into the post-office on the same day it was dishonored, early enough to have gone with the mail of that evening. The law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the note; all that is required is ordinary reasonable diligence: and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business. In the case of the *Bank of Columbia v. Lawrence*, 1 Peters, 578, 583, it is said by this court to be well settled at this day, that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law; that this is best calculated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and, although the demand of payment at the bank was required to be made during banking hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice Hosmer, in the case of the *Hartford Bank v. Stedman & Gordon*, 3 Conn. 489, 495, that it will always come to a question, how swiftly the notice can be conveyed. We think, therefore, that the notice sent by the mail, the next day after the dishonor of the note, was in due time.

LAWSON v. THE FARMERS' BANK OF SALEM.

Supreme Court of Ohio, January, 1853. 1 Ohio St. 206.

Though, if there is no mail on the day succeeding dishonor, or if the mail on such day be made up and closed before business hours, it will be sufficient to send notice on the next mail thereafter¹ Every indorser has the same time after receiving notice, in which to send it, that the holder has.²

ERROR to the Court of Common Pleas of Columbiana County, reserved in the District Court for decision by the Supreme Court.

The original action was assumpsit for recovery against Lawson & Covode, as indorsers of a bill of exchange in the following form: "Waterville, April 25, 1848, \$4000. Ninety days after date, pay to the order of Lawson & Covode four thousand dollars, value received, and place the same to the account of yours, etc., W. F. Jordan. To J. Jordan & Son, Pittsburgh." Indorsed: "Pay to Farmers' Bank of Salem. Lawson & Covode." Accepted by "J. Jordan & Son."

The declaration counts upon the instrument, and also contains the common counts. Plea, *non assumpsit*.

It appears that this bill, which was drawn and indorsed in this State, was discounted by the Bank of Salem, and the money paid to the acceptors thereof. Subsequently it was indorsed by the Bank of Salem to the Exchange Bank of Pittsburgh for collection, Jordan & Son living in that city. It matured in the hands of the Exchange Bank of Pittsburgh on the twenty-seventh day of July, 1848, and being dishonored by the acceptors in Pittsburgh was protested for non-payment by a notary.

On the trial of the cause in the Common Pleas, the bank gave the bill in evidence, and the protest attached thereto, dated July 27, 1848, also a certified copy of the notarial record of the notary, with proof of his death since the protest of the bill. The defendants below objected to this last testimony, but the court admitted it. During the trial the bank called J B and J D as witnesses, both being stock-holders and directors of the Salem Bank not only at that time but also when the bill was discounted and reached its maturity. Their testimony was objected to, but received.

The bank having rested, the defendants below gave in evidence the notice of protest sent to the Salem Bank by the notary, and produced by the cashier of the Salem Bank. And evidence having been given that the Exchange Bank of Pittsburgh closed at three o'clock P.M. on the 27th July, 1848; that the notary's office was about one square from the Pittsburgh post-office; that the mail left Pittsburgh for Salem at ten o'clock A. M. on the 28th of July, and was closed at ten minutes after nine o'clock A. M.; and that the business hours

¹ N. I. L. § 121.² Id. § 124.

of Pittsburgh were from seven o'clock A. M. till dusk, — the parties rested. The notarial protest does not state when the notices were deposited in the post-office; but the notice to the Salem Bank, which covered the notice to Lawson and Covode, the accommodation indorsers, is mail-marked at the Pittsburgh post-office, July 29, 1848.

Instructions to the jury were objected to by the defendants, and the jury returned a verdict for the plaintiff for \$4513.33.

[Argument not reported.]

BARTLEY, J., (after considering the question of the competency of the witnesses, J B and J D). Touching the second question, then, did the Court of Common Pleas err in charging the jury that, if the notice to the indorsers of the demand and non-payment of the bill was deposited in the post-office at Pittsburgh *at any time* during the day after the day of dishonor, without regard to the time of the departure of the mail for that day, it would be sufficient notice; and, moreover, that if it was found inconvenient to deposit the notice in the post-office in time for the mail of that day, it was in proper time if the notice was deposited in time to be sent off by the next mail of the day next after the day following the day of the dishonor of the bill?

This involves a very important question of the law merchant, and it is not a little surprising that there should remain any doubt or uncertainty, at this late day, upon a question of such vital importance to the interest of commercial countries, respecting the duties and liabilities of holders and parties to dishonored paper. And it is a matter of no small moment, that a question which enters so largely as does this into the every-day business transactions of different commercial states and countries should be settled, not only upon a certain and unvarying, but also upon a uniform basis.

The liability of the indorser is strictly conditional, dependent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the indorser to look to his own interest, and take immediate measures for his indemnity. The demand and notice being conditions precedent to the indorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover. The plaintiffs in error in this case, being accommodation indorsers, may well insist upon strict proof of due diligence in giving notice of the dishonor of the bill.

The law does not require the utmost diligence in the holder, in giving notice of the dishonor of a bill or note. All that is requisite is ordinary or reasonable diligence. And this is not only the rule and requirement of the law merchant, but a statutory provision of this State. But what amounts to due diligence or reasonable notice is,

when the facts are ascertained, purely a question of law, settled "with a view to practical convenience, and the usual course of business."

The question was at one time strenuously contested, whether due diligence did not require that, where the parties reside in the same place, the notice of non-payment should be given on the day of the dishonor of the bill; and where the parties reside in different places, should be sent by the mail of that day, or the first possible or practicable mail after the default. *Tindal v. Brown*, 1 T. R. 167; *Darbishire v. Parker*, 6 East, 3; *Marius, Bills*, 24. But the rule was established and is supported by the great weight of authority, that, where the parties reside in different places, and the post is the mode of conveyance adopted, although it was in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor, — the holder being entitled to the whole of that day, being the day of the dishonor, or knowledge of the dishonor, to prepare his notice, — yet that the notice would be insufficient unless put into the post-office in time to go by the next mail after that day. And this is in conformity with the rule laid down by Mr. Chitty in his learned treatise on Bills of Exchange, in the following explicit language: "When the parties do not reside in the same place, and the notice is to be sent by general post, then the holder or party to give the notice must take care to forward notice by the post of the next day after the dishonor, or after he receives notice of such dishonor, whether that post sets off from the place where he is early or late; and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day." *Chitty, Bills*, 485.

This is in accordance with the rule as settled by the Supreme Court of the United States. In *Lenox v. Roberts*, 2 Wheat. 373, Chief Justice Marshall says: "It is the opinion of the court that notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the day succeeding the last day of grace." And in the case of the *Bank of Alexandria v. Swann*, 9 Peters, 33, Mr. Justice Thompson approved of the general rule laid down in the case of *Lenox v. Roberts*, holding that notice of the dishonor need not be forwarded on the last day of grace, but should be sent by the mail of the next day after the dishonor.

The same rule was adopted by Mr. Justice Washington in the case of the *United States v. Parker's Administrators*, 4 Wash. 465; and in which case subsequently that decision was affirmed on error by the Supreme Court, 12 Wheat. 559. The same rule received the sanction of Mr. Justice Story, in the case of the *Seventh Ward Bank v. Hanrick*, 2 Story, 416, although, in the case of *Mitchell v. Degrand*, 1 Mason, 180, he appears to have been disposed to even greater strictness, holding that when a bill is once dishonored, the holder is bound

to give notice by the next practicable mail, to the parties whom he means to charge for the default. This, however, is explained by Mr. Justice Washington in the case of *United States v. Parker's Administrators*, to mean that the notice should be put into the office in time to be sent by the mail of the succeeding day. This rule, adopted by the Supreme Court of the United States, and which is supported by the great weight of authority in England and in the several States of the Union in which the question appears to have been settled by reported adjudications, is subject to some qualification, relaxing its rigor. If two mails leave the same day on the route to the place of the residence of the indorser, it is sufficient to deposit the notice in the post-office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted. *Whitewell v. Johnson*, 17 Mass. 449, 454; *Howard v. Ives*, 1 Hill (N. Y.), 263.

And for the reason that the mail of the day succeeding the day of the default may go out in some places soon after midnight or at a very early hour in the morning, and is sometimes made up and closed the evening preceding, it has been adjudged that, inasmuch as the holder is allowed till the day after the day of default to send off the notice, reasonable diligence would not require him to deposit the notice in the post-office at an unreasonably early hour, or before a reasonable time can be had for depositing the notice in the post-office after early business hours of that day. The rule, as qualified and settled by the late authorities, and which I take to be the correct one, is that where the parties reside in the same place or city, the notice *may* be given on the day of default; but if given at any time before the expiration of the day thereafter, it will be sufficient; and when the parties reside in different places or States, the notice *may* be sent by the mail of the day of the default; but if not, it *must* be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed at an unreasonably early hour. If, however, the mail of that day be closed before a reasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post. In the case of *Downs v. The Planters' Bank*, 1 Sm. & M. 261, and also the case of *Chick v. Pillsbury*, 24 Me. 458, the doctrine on this subject has been more fully examined than perhaps in any of the older cases; and the rule adopted is that the notice, in order to charge the indorser living in another place or State, *must* be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonable early hour, or before early and convenient business hours. And this rule is well sustained by authority. *Fullerton et al. v. The Bank of the United States*, 1 Peters, 605, 618; *Eagle Bank v. Chapin*, 3 Pick. 180, 183; *Talbot v. Clark*, 8 Pick. 51; *Carter v. Burley*, 9 N. H. 559, 570; *Farmers' Bank of Maryland v.*

Duvall, 7 Gill & Johns. 79; *Freeman's Bank v. Perkins*, 18 Me. 292; *Mead v. Engs*, 5 Cowen, 303; *Sewall v. Russell*, 3 Wend. 276; *Brown v. Ferguson*, 4 Leigh, 37; *Dodge v. Bank of Kentucky*, 2 Marshall, 610; *Hickman v. Ryan*, 5 Littell, 24; *Hartford Bank v. Steedman*, 3 Conn. 489; *Brenzer v. Wightman*, 7 Watts & S. 264; *Townslay v. Springer*, 1 La. 122; *Bank of Natchez v. King*, 3 Robinson, 243; *Brown v. Turner*, 1 Ala. 752; *Lockwood v. Crawford*, 18 Conn. 361, 363; *Bayley, Bills*, 262; *Story, Promissory Notes*, § 325; and *Byles, Bills*, 160.

Some obscurity and uncertainty have been created on this subject by the expression used in some of the cases, and by some of the elementary writers, that the holder or person giving the notice has "one day" or "an entire day" in which to give the notice after the day of the dishonor. The term "one day" or "an entire day" seems not to have been used always in the same sense; and the confusion appears to have, in part, arisen from the fact that, where the parties reside in the same place, notice at any time before the expiration of the day after the day of the default will be sufficient, while, where the parties reside in different places, the notice must frequently be mailed early in the day to be in time for the mail of that day.

The defendant in error relies upon the doctrine laid down in the elementary works of Chancellor Kent and Mr. Justice Story, as fully sustaining the charge of the court below. Inasmuch as precision and certainty in the settlement of this rule are of very great importance, a careful examination of the subject seems to be required.

[After discussing the statement of the rule in 3 Kent's Com. 106, and Story on Bills of Exchange, §§ 290, 291, 382 and 288, the court proceeds:]

The statement of the rule in the last extract is consistent with the doctrine established by the Supreme Court of the United States, and fully sustained by authority.

The discrepancies which have arisen on this subject appear to have grown out of an inaccurate use, in some of the books and decisions, of the terms "his day," "an entire day," and "a whole day," etc., these phrases being at one time understood or taken literally, and at another time to mean a space of time equal to a full day. If these phrases are to be taken to mean the duration of a full day, instead of the day itself, in their general application, the effect would be to change and break down numerous well-settled and useful rules. The law, as a general thing, does not have regard to the fractions of a day, and thus compel parties to resort to nice questions of the sufficiency of a certain number of hours or minutes, and to the taking of the parts of two different days to make up what may be considered in one sense a day, because equal in duration to one entire day. If this were the case, the indorser, after having been notified, would often be unable to determine whether he had been notified in season or not,

until he had learned the hour of the day when the default occurred; and the holder would have it in his power at times of affecting injuriously the right of the indorser to an early notice, by delaying the presentment until a late hour in the day. Nothing more could have been intended by the use of these phrases than that each party should have a specified day upon which the act enjoined upon him should be performed. This is the sense in which Lord Ellenborough used it in the case of *Smith v. Mullett*, 2 Camp. 208, when he said: "If a party has an entire day, he must send off his letter conveying the notice within post-time of that day." And, it is said by a learned elementary authority, "If a party has an entire day, he must send off his letter conveying the notice of the dishonor of the bill within post-time of that day." Byles, Bills, 161.

The rule laid down in *Smith's Mercantile Law*, to which the defendant in error has referred, will not, as I apprehend, be found on close examination to be at variance with the doctrine here adopted. *Smith's Mercantile Law*, 310.

It is claimed, on behalf of the plaintiffs in error in this case, that the notice of the dishonor of the bill should have been sent immediately to them, instead of being sent, as it was in the first place, to the Bank of Salem. The holder is not bound to give notice of the dishonor to any more than his immediate indorser; and each party to a bill has the same time after notice to himself for giving notice to other parties beyond him that was allowed to the holder after the default.¹ *Sheldon v. Benham*, 4 Hill (N. Y.), 129; *Eagle Bank v. Hathaway*, 5 Met. 213. And when a bill is sent to an agent for collection, the agent is required simply to give notice of the dishonor in due time to his principal; and the principal then has the same time for giving notice to the indorsers after such notice from his agent as if he had been himself an indorser, receiving notice from a holder. *Bank of the United States v. Davis*, 2 Hill (N. Y.), 452; ² *Church v. Barlow*, 9 Pick. 547. The party in this case, therefore, was not at fault by sending the notice directly to the Bank of Salem, leaving that bank to send the notice to the plaintiffs in error.

Applying the rule, therefore, which we have adopted as the correct one, to this case, it was incumbent on the plaintiff below, in order to be entitled to a recovery, to show that the notice of the dishonor of the bill was deposited in the post-office in Pittsburgh in time to be sent by the mail of the twenty-eighth day of July. Ten minutes past nine o'clock in the morning was not an unreasonably early hour, or before a reasonable and convenient time after the commencement of early business hours of the day. The neglect, therefore, to send the notice by the mail of the next day after the day of the default operated to discharge the plaintiffs in error as indorsers, unless from some other cause notice had been dispensed with or rendered unnecessary.

¹ N. I. L. § 124.

² *Ante*, p. 265.

And for the charge of the Court of Common Pleas to the jury to the contrary, the judgment is reversed, and the cause remanded for further proceedings.

Judgment of Common Pleas reversed.

WALKER v. STETSON.

Supreme Court of Ohio, December, 1862. 14 Ohio State, 89.

In the absence of any designated place, notice must be sent to the indorser's place of business or abode, if, by the exercise of reasonable diligence, either can be found.¹

ACTION by the holder against the indorser of certain bills of exchange. Judgment for the plaintiff. Writ of error on instructions to the jury. The facts appear in the opinion.

[Argument reported.]

RANNEY, J. The bills of exchange upon which this action was brought were drawn and indorsed by the plaintiff in error. His liability upon them was conditional, and his obligation to pay them depended upon their being duly dishonored, and legal notice of such dishonor; unless, indeed, he had waived such diligence on the part of the holder. The bills were legally dishonored and properly protested, and notices for all the parties conditionally liable were in due time forwarded to the defendant in error, a subsequent indorser of the bills. The right to recover was placed upon two grounds: 1. That the defendant in error had, on the day he received these notices, forwarded by mail those directed to the plaintiff in error, to his place of business at Chicago; and, 2. That a few days thereafter, in a personal interview with the defendant in error, he had recognized his liability as still existing, and had expressly promised to pay the bills. The verdict of the jury may have been founded upon the ground last stated, but, as there was a conflict in the evidence upon it, there is nothing in the record to show that it was; and we are, consequently, compelled to examine the facts applicable to the first ground, and the instructions of the court based upon that state of facts.

Stating these facts as broadly as anything in the evidence will warrant, they amounted to this: The plaintiff in error was a resident of Morristown, New Jersey, and had no fixed residence in the State of Ohio, or at Chicago, but during most of the season of 1856 had been engaged in the lumber business, staying at Cleveland, and in Ottawa County, where he owned a saw-mill; that about the 1st of November he left Cleveland, and, before doing so, informed the defendant in

¹ N. I. L. § 125.

error that he was going to Chicago to dispose of a quantity of lumber which he was about shipping to that place, and should return from there to Cleveland; and had not returned when the notices were mailed to him at Chicago on the 22d of that month, — that being the very day upon which they were received by the defendant in error from the notary in New York. In point of fact, the plaintiff in error was in Chicago when the notices were mailed to him, but probably left there before they arrived, and shortly after was in Cleveland, where he was met by the defendant in error, and fully informed of all that had transpired.

Upon this state of the facts, counsel for the plaintiff in error requested the court to charge the jury: "That if the defendant's residence was not in Chicago, or he was not engaged in any permanent business there, but was there temporarily, and for a temporary purpose only, the sending to him, at Chicago, notices of the protest of said bills of exchange would not be, unless the defendant actually received them, due diligence, and sufficient to charge the defendant with the payment of said bills."

To which the court responded as follows: "That if the defendant did not reside in Chicago, and was not engaged in any permanent business there, but was there for a purpose merely temporary, sending notices of protest to him at Chicago would not, as a proposition of law, constitute due diligence sufficient to charge the defendant. But if the defendant had gone to Chicago on business which would detain him an indefinite period of time, and might occupy him there during the remainder of the season of navigation on the lakes, that might be the proper place to send the notices to him; and it was a question of fact for the jury to find, referring to all the testimony on that question, whether the business of the defendant at Chicago was of that character, or whether the plaintiff had sufficient reason from his information derived from the defendant, or from his own knowledge of the defendant's business, to believe the defendant was at Chicago at the time the notices were sent by him, such notices would be due diligence on the part of the plaintiff, and sufficient to charge the defendant."

If we were permitted to treat the matter as a question of injury to the plaintiff in error, there would be no difficulty whatever in saying that he lost nothing by the course pursued by the defendant in error, and probably was actually informed of the dishonor of the bills sooner than he could have been, if the notices had been sent to his residence in New Jersey. But we are not at liberty to take so wide a view of the subject.¹ The law has very definitely settled what shall constitute due diligence in such cases, and when the facts are ascertained, it is the duty of the court to determine, as a question of law,

¹ Cf. *Foster v. Parker*, 2 C. P. D. 18, *post*, p. 304.

whether reasonable diligence has been used; and it cannot be submitted to the jury as a question of fact. *Bank of Columbia v. Lawrence*, 1 Peters, 578; *Bank of Utica v. Bender*, 21 Wend. 643;¹ *Carroll v. Upton*, 3 Comst. 272; *Wheeler v. Field*, 6 Met. 290; *Belden v. Lamb*, 17 Conn. 442; *Lorain Bank of Elyria v. Townsend*, 2 Ohio State, 343. The object has been to attain the greatest possible certainty in a matter so vital to the interests of the mercantile community, and the equities of particular cases have not been allowed to interfere with the attainment of this object. In this State, these rules have been fully adopted and constantly enforced, and, if we saw reason now to doubt their justice or policy, we should find ourselves unable to change them, without a corresponding change should take place in States and countries with which our commercial relations are so extensive and important.

The parties in this case not residing in the same place, there is no doubt that it was a proper case for sending the notices by mail,² and in such cases it is well settled that putting into the post-office seasonably a notice properly directed is, in itself, due diligence, or constructive notice, and will be sufficient, although it never reaches the party to whom it is directed. *Woodcock v. Houldsworth*, 16 Mees. & W. 124; *Dickins v. Beal*, 10 Peters, 570; *Jones v. Lewis*, 8 Watts & S. 14. As to the place to which the notice should be directed, it is equally well settled that it should be sent to the drawer or indorser's residence or place of business, if either is known to the holder, or, upon diligent inquiry, can be ascertained; and if neither are known nor can be found, the law dispenses with any notice whatever. *Bank of the United States v. Carneal*, 2 Peters, 543; *Chitty, Bills*, 486; *Bayley, Bills*, 280. But while this is the general principle, the spirit of the rule certainly is, that the notice should be sent to such place that it will be most likely promptly to reach the person for whom it is intended; and hence, in its application to particular cases, it has often been held that a notice is sufficient if sent to the post-office where the party usually receives his letters, although not that of his residence, as well as to that where he resides;³ and in all cases the notice may be sent to the place pointed out by the drawer or indorser, and in general will be sufficient, both in reference to himself and parties who stand behind him on the bill. *Reid v. Payne*, 16 Johns. 218; *Bank of Geneva v. Howlett*, 4 Wend. 328; *Bank of United States v. Lane*, 3 Hawks, 453; *Shelton v. Braithwaite*, 8 Mees. & W. 252. Indeed, it is suggested in the present case that the statement made by the plaintiff to the defendant in error sufficiently indicated Chicago as the place to which the notices might be sent. Whatever

¹ *Post*, p. 283.

² N. I. L. § 113. It may in all cases be given by delivering it personally or through the mails.

³ N. I. L. § 125.

of weight this suggestion may properly have, it can only be considered by us when the case in the court below appears to have been decided upon that ground. As yet this consideration has not been passed upon in that court.

How then, in view of the foregoing principles, stands the case before us? Was Chicago, in the sense of the legal rule, so far the residence or place of business of the party as to make the notices sent there constructive notice of the dishonor of the bills? A very careful examination of all the evidence now contained in the record has fully satisfied us that it was not. Upon this point, there is no conflict in the evidence. The plaintiff below says the defendant informed him he was going to Chicago "to dispose of a quantity of lumber, which he was about shipping to that place, and should return from there to Cleveland;" that he knew the defendant had been to Chicago, but did not know that he was there when the notices were mailed, and had reason to believe he did not receive them there, as he was soon afterward back to Cleveland. The defendant says he went to Chicago, and was there from the 1st to the 24th of November, "disposing of a quantity of lumber," and in the afternoon of the day last named, he left Chicago, and arrived at Cleveland on the morning of the 26th; that he had no permanent business at Chicago, and was there for a temporary purpose only, and never received the notices sent.

The question is then reduced to this: Does going to a city to dispose of property, which occupies the party for three weeks of time, without one word of explanation as to the mode of doing the business, or his relations to the post-office, make such city his place of business within the meaning of the commercial rule? If we were to affirm that it did, the principle must have a very wide, and as we think a very disastrous, application to a large class of business men, dealing more largely than any other in commercial paper. The stock and produce of the West are taken to the eastern cities, by persons engaged in that business, to be sold; and most western merchants, once or twice in each year, spend from a few days to a few weeks at the same places, replenishing their stocks of goods. Did anybody ever suppose that these persons were bound to watch the post-offices in those cities for notices of the protest of their paper? We think not; and yet, if these notices are sufficient, we see no distinction to be taken between this case and theirs. It is very certain that no decided case has given any countenance to the supposition that such a notice, not received by the party, would be sufficient.

The cases of *Tunstall v. Walker*, 2 Sm. & M. 638, and *Chouteau v. Webster*, 6 Met. 1, have, perhaps, gone to the verge of the law, but they are very far from reaching this case. In each of those cases, the defendant was, at the time the notice was forwarded to him at Washington, a senator in Congress, and in actual attendance on that body. The first of these cases had been before decided by the High Court

of Errors and Appeals, and is reported in 1 How. (Miss.) 259. Upon the then state of the evidence, the court held that a notice sent to Washington City, when the senator had a residence in the State which he represented, would not be sufficient to charge him as an indorser; and the reason assigned is that "his absence was but temporary, and the duration of that absence uncertain. In case of such absence from home, the law presumes that some member of the family is still at the residence, and that communications will be forwarded to the proper address." But, upon a further trial of the case, it was proved that the defendant had no actual residence in Mississippi, and had left no agent at his last place of abode to receive or forward his letters; that from the 4th of February, when the notice was forwarded, to the 4th of March ensuing, he was in the actual discharge of his official duties at Washington, and in the daily habit of receiving his letters at the post-office in that city; and, upon this state of facts, the court held the notice sent to that city sufficient. In the case of *Chouteau v. Webster*, the defendant had left an agent in Boston in charge of his business, but this was unknown to the holder of the paper, and upon an agreed statement of the facts showing that the notice was, in due time, deposited in the post-office directed to the defendant at Washington, where he was then, and for some time afterward, in attendance upon a session of Congress; and that all letters addressed to members were regularly and immediately taken from the post-office by officers of the Senate, and delivered to such members, the court held the notice sufficient. Shaw, C. J., after premising the caution that the "decision is founded on the circumstances of the particular case, and may be varied by other facts," proceeds to place it upon the ground that, while the defendant's domicile was at Boston, his "actual residence" was at Washington, "to which, for the time being, he was fixed by his public duty." We have no doubt of the correctness of these decisions; and no comment can be necessary to distinguish them from a case where the party simply visits a place for a purpose clearly temporary and special, with no proof to show that he has identified himself with its business, or established any relations with its post-office.¹ Regarding that as this case, we are clearly of the opinion that the plaintiff in error was entitled to the instruction he asked, and that the learned judge erred in the qualifications he annexed to the instruction given.

If we were entirely satisfied of the correctness of this qualification in the abstract, we should still be compelled to reverse the judgment for the reason that there was no evidence to give any wider scope to the inquiry than that contemplated in the instruction asked for. That this was an error has been settled by this court, and the value of jury

¹ Establishing relations with the post-office in that place could have no effect, other than to make the city where the defendant was temporarily, his place of business for the purpose of receiving notice.

trial will very much depend upon the observance of the principle. In *Bain v. Wilson*, 10 Ohio State, 16, the instruction asked and given, as well as the qualification annexed by the court, were all held to be a correct exposition of the law; and yet, as "there was no evidence before the jury which required or even authorized the qualification annexed by the court," the judgment was reversed. The court say: "The judge must confine himself in his remarks to the law and evidence of the case. So far from being under any obligation to call the attention of the jury to a conjectural state of facts, it would be highly improper for him to do so." And the reason for this is very pertinently stated in one of the cases referred to: "Jurors are constantly inclined to look to the opinion of the judge for instruction as to what is and what is not evidence. When he tells them to determine a given problem from the evidence before them, they can hardly do otherwise than infer that, in his judgment, there is evidence upon which their verdict, when given, may rest." *Fay v. Grimstead*, 10 Barb. 321.

But we are very far from being satisfied that the qualification annexed in this case does contain a correct statement of the law. After stating that, if the plaintiff in error was in Chicago for a purpose merely temporary, the notices would not be sufficient, the court proceeded to say that if his business there was such as would detain him an indefinite time, and "might occupy him there during the remainder of the season of navigation on the lakes," it might be proper to send the notices to that place. If he went there for the special purpose stated in the evidence, we do not think it would make any difference that he could not tell precisely when he would be able to sell his property; and, when it is remembered that this was in the month of November, we do not think that a delay in effecting his object until the navigation should close would be in any way decisive. At most, it would be but a circumstance, entitled to its just weight with others in determining the question whether Chicago was his place of business, or whether he was a mere sojourner there for a special and limited purpose.¹ In the one case, he might be charged by a notice sent to that post-office, because he is presumed to have established relations with it; in the other, no such presumption arises, and he can be charged only upon the actual receipt of the notice. Indeed, when the whole instruction is taken together, it amounts to little less than a request to the jury to go beyond the uncontradicted and legally insufficient facts in evidence, and inquire into the motives of the plaintiff below; and concluding with the positive instruction that, if he had sufficient reason "to believe the defendant was at Chicago at the time the notices were sent," they would be sufficient to charge him.

¹ But cf. N. I. L. § 125, 3, providing that, if a party is sojourning in another place, notice may be sent to the place where he is so sojourning.

Without perhaps intending to do so, it seems to us that the court has incautiously surrendered its rightful province to judge of the sufficiency of the facts to constitute due diligence, and has devolved that duty upon the jury. To approve of that would be to abandon all that has been gained in the way of certainty, in the determination of questions of this character.

While it is true that the rules necessary to be observed in charging parties conditionally liable upon negotiable paper are strict, and require much care and promptitude on the part of the holder, yet they are such as long experience has demonstrated to be necessary, and a substantial compliance with them lies at the very foundation of the contract into which the drawer or indorser enters. His contract is conditional; and to make it absolute, without a fair performance of the conditions, would be to make a contract for him, instead of enforcing the one he has made for himself.

The judgment must be reversed, and the cause remanded to the District Court of Cuyahoga County for further proceedings.

BANK OF UTICA v. BENDER.

Supreme Court of New York, October, 1889. 21 Wend. 643.

Whether notice of dishonor has been given is a question of the exercise of due diligence, for the court to decide.¹

ASSUMPSIT by the holder against an indorser of a bill of exchange. Defence, that due notice had not been given. Verdict for the plaintiff, under instructions that the evidence (stated in the opinion) was sufficient to charge the defendant; to which the defendant excepted. Motion for a new trial. The facts appear in the opinion.

[Argument not reported.]

BRONSON, J. When the facts are all ascertained, what is reasonable diligence is a question of law. "This results," said Spencer, J., in *Bryden v. Bryden*, 11 Johns. 187, "from the necessity of having some fixed legal standard, by which men may not only know the law, but be protected by it." Bayley, Bills, 142, 144 and notes. The judge was not requested to submit the question of due diligence to the jury; but, had it been otherwise, he was right in treating it as a question of law, there being no dispute about the facts.

Was there reasonable diligence in endeavoring to ascertain the place to which the notice should be directed? Not knowing where the defendant lived, the plaintiffs inquired of the drawer for whose

¹ N. I. L. § 129.

accommodation the bill was discounted, and relying upon the information given by him, they sent the notice to Chittenango, when it should have been sent to Manlius or Hartsville. This is not like the case of the Catakil Bank *v.* Stall, 15 Wend. 364, affirmed in error, 18 id. 466; for there the person who took the note to the bank, and gave the information on which the notice was misdirected, was the agent of the indorsers, and they had no right to complain that credit had been given to what was, in effect, their own representation.

But I am unable to distinguish this from the case of the Bank of Utica *v.* Davidson, 5 Wend. 587. That was an action against the indorser of a note which had been discounted for the accommodation of the maker, and the notice of protest was sent to Bainbridge, when it should have been sent to Masonville, where the indorser lived. The person who took the note to the bank, and gave the information on which the plaintiffs acted, was the agent of the maker, and it was held that there had been due diligence, and judgment was rendered for the plaintiffs. Sutherland, J., mentions the fact that the note was dated at Bainbridge, where the notice was sent, and that the indorser had but recently removed from that place; but the case was put mainly on the ground, that the plaintiffs had a right to rely on the information given by the agent of the maker when the note was discounted. In the case at bar, notice was directed to the place where the bill purports to have been drawn; and the only difference between this and the case of the Bank of Utica *v.* Davidson consists in the single fact, that the indorser of this bill had never lived at Chittenango. That does not, I think, furnish sufficient ground for a solid distinction between the two cases.

How does the question stand upon principle? It is not absolutely necessary that notice should be brought home to the indorser, nor even that it should be directed to the place of his residence. It is enough that the holder of a bill make diligent inquiry for the indorser, and acts upon the best information he is able to procure. If, after doing so, the notice fail to reach the indorser, the misfortune falls on him, not on the holder. There must be ordinary or reasonable diligence, — such as men of business usually exercise when their interest depends upon obtaining correct information. The holder must act in good faith, and not give credit to doubtful intelligence when better could have been obtained.

Now, what was done in this case? The plaintiffs inquired of Cobb, the drawer of the bill, who would of course be likely to know where his accommodation indorser lived. They saw that the defendant, by lending his name, had evinced his confidence in the integrity of the drawer; and so far as appears, nothing had then occurred which should have led the plaintiffs, or any prudent man, to distrust the accuracy of Cobb's statements concerning any matter of fact within his knowledge. He professed to be able to give the desired informa-

tion, and his answer was unequivocal. If Cobb was worthy of being believed, there was no reason for doubt that the indorser resided at Chittenango. The plaintiffs confided in this information, and acted upon it.

But it is said that Cobb had an interest in giving false information for the purpose of protecting his accommodation indorser, and consequently that the plaintiffs should not have trusted to his statement. He certainly had no legal interest in the question. If the bill was not accepted and paid by the drawee, Cobb as the drawer was bound to pay and take it up from the holder; and if the indorser was charged, Cobb was bound to see him indemnified. In a legal point of view, it was wholly a matter of indifference to him whether notice of the dishonor of the bill should be brought home to the indorser or not. Before anything can be made out of the objection, we must say that the plaintiffs were bound to suspect that Cobb, when he presented the bill, intended to commit a fraud; that he was obtaining a discount upon a draft which he knew would not be paid, either by the drawee or by himself; that the money was to be lost to some one, and that he preferred the loss should fall on the holder rather than the indorser; and consequently, that he would give false information concerning the proper place for directing notice. It is quite evident that the plaintiffs entertained no such suspicion; for, if they had, they would neither have confided in the statements of Cobb, nor would they have loaned him the money. I think they were not bound to believe that a fraud was intended. There was nothing in the circumstances of the case calculated to induce such a belief in the mind of any man of ordinary prudence and foresight. This was an every day business transaction, where men must of necessity repose a reasonable degree of confidence in each other, and no one can be chargeable with a want of diligence for trusting to information which would usually be deemed satisfactory among business men. If there was any ground whatever for suspecting fraud on the part of Cobb, it was, to say the least, very slight, and was fully counterbalanced by the fact that the defendant had testified his confidence in Cobb by lending his name as indorser. The plaintiffs have, I think, lost nothing by trusting to information derived from the drawer of the bill, instead of seeking it from some other individual.

The case then comes to this: The plaintiffs applied for information to a man worthy of belief, and who was likely to know where the indorser lived. They received such an answer as left no reasonable ground for doubt that Chittenango was the place to which the notice should be sent. I think they were not bound to push the inquiry further. Men of business usually act upon such information. They buy and sell, and do other things affecting their interest, upon the credit which they give to the declarations of a single individual con-

cerning a particular fact of this kind within his knowledge. This is matter of common experience. Ordinary diligence in a case like this can mean no more than that the inquiry shall be pursued until it is satisfactorily answered. This is the only practical rule. If the holder of a bill is required to go further, it is impossible to say where he can safely stop. Would it be enough to inquire of two, three, or four individuals, or must he seek intelligence from every man in the place likely to know anything about the matter? It would be difficult, if not impossible, to answer this question.

New trial denied.

NOTE. — In *Dickins v. Beal*,¹ 10 Peters, 572, 578, it was said by Mr. Justice Baldwin:

"The next question which arises is on the admission of the evidence of the postmaster at Nashville, and his deputy, in relation to the course of the mail, the usage of the office, and the facts to which they testify.

We are at a loss to perceive any plausible objection to the evidence which was received by the court, on the assumption that notice of the dishonor of the bills must be made out by the plaintiff, which could be done in two ways. 1. That the bills had been duly protested for non-acceptance; and due and legal diligence used in giving notice thereof to the parties on the bills, in which case the legal presumption of its receipt in time would attach. 2. By proof that the notice actually came to hand in proper time, though the letter containing the notice was not properly directed, or sent by the most expeditious or direct route. The fact of notice, and its reception in due time, are the only matters material to the drawer or indorser of a dishonored bill; the manner or place in which he received such notice is immaterial; for all the objects to be answered by its reception, it is equally available to them. To the holder it is immaterial whether the evidence of notice consists in the legal presumption arising from due diligence, which supplies the place of specific evidence, and is binding on a jury as proof of the fact of its reception, or it is established by direct evidence, or such circumstances as will, in law, justify them in drawing the inference. 2 Pet. 132.

Since the case of *Buckner v. Findley and Van Leer*, 2 Pet. 589, 591, decided on great consideration, it has been the established doctrine of this court, that a bill of exchange drawn in one of the States of this Union, on a person in another, is a foreign bill, and to be treated as such; and that in this respect they are to be considered as States foreign to each other, though they are otherwise as to all the purposes of their federal constitution. Among these purposes are the establishment of post-offices and post-roads, the regulation of which has been delegated to the federal government, and is exercised by their laws and the regulations of the post-office department conformably thereto. On these depend all the communications between the States by mail, the time of departure from different places, its route, place, and course of its arrival and distribution. The usage of the officers employed in the various details of the operations of the department, when acting within the line of their duty, as prescribed by law and regulations, become all-important to a court and jury in deciding on what is legal diligence in giving notice, or what is evidence of its reception.

It is legal diligence in the holder of a bill, if he avails himself in time of

¹ The case is reported, *ante*, p. 152.

the means of communicating notice, which are thus afforded; but he is not answerable for any defects in the outline or details of the regulation of the mails for the route in which the letter is carried, the time which elapses from its deposit in the office and delivery, or the mode of carrying or distributing the mails;¹ but it is proper that he should give evidence of all these matters, as well to repel the imputation of laches if the letter does not come to hand or not in due time, as to prove its regular delivery, if there should be any doubt as to the use of diligence, in the direction or deposit of the letter. Such evidence is uniformly received in cases arising on the notice of dishonored bills."

THE WAMESIT BANK v. BUTTRICK.

Supreme Court of Massachusetts, October, 1858. 11 Gray, 387.

And to enclose notices for all prior parties in an envelope addressed to the last indorser is due diligence on the part of the holder; and all parties are deemed to be notified thereby.²

ACTION of contract upon a promissory note, with a first count against Fiske and Norcross the first indorsers, a second count against Thomas Lord, the second indorser, and a third count against Buttrick, the third indorser, as allowed by St. 1852, c. 312, § 3. The defendants answered severally.

At the trial in the Court of Common Pleas, there was evidence tending to show that the plaintiffs sent the note for collection to their agents, the Bank of Commerce at Boston, who indorsed it and sent it to their agents in New York; that on the 24th of March, 1856, payment was demanded of the maker and refused, and the note duly protested for non-payment, and notices thereof, addressed to each indorser, on the same day enclosed by the notary in a letter to the Bank of Commerce at Boston, and put into the post-office at New York and the postage paid; that this letter was never received by the Bank of Commerce, but was lost; that the plaintiffs' cashier received the note with a copy of the protest on the 27th or possibly the 28th of March, 1856, and before the evening of the 28th went to Buttrick with the note and notified him of its dishonor, and asked him to waive demand and notice, which he refused to do, saying that he had received no notice; and that the cashier did not know of the failure of the notices until Buttrick told him. The plaintiffs further offered to prove that the note with a copy of the protest was received at the Bank of Commerce on the 26th of March and transmitted the same day to the plaintiffs.

But MORRIS, J., upon this evidence ruled that Buttrick was discharged from his liability as indorser, by reason of want of due

¹ N. I. L. § 122.

² *Cl. Van Brunt v. Vaughn*, 47 Ia. 145.

diligence in the plaintiffs in notifying him of the dishonor of the note; and directed a verdict for him, which was returned, and judgment rendered thereon for Buttrick, and the action continued so far as related to the other defendants. The plaintiffs alleged exceptions.

[Argument reported.]

BIGELOW, J. The facts show that due diligence was used in giving notice of the dishonor of the note to the defendant. Notices in due form, directed to all the indorsers, of the non-payment of the note were seasonably put into the post-office in New York under cover to the last indorser. This was according to the usage and practice of merchants and bankers, and shows a sufficient compliance with the rule of law requiring notice to indorsers of the dishonor of a note or bill of exchange. It is immaterial that the holder or last indorser held the note for collection only, and was not an indorser for a valuable consideration. *Eagle Bank v. Hathaway*, 5 Met. 215. The notices having been seasonably and properly put into the post-office, it is immaterial that they were never received and forwarded, by reason of being lost in the mail. *Munn v. Baldwin*, 6 Mass. 316. Due diligence did not require anything further to be done in order to hold the indorsers. Story on Bills, § 382; Bayley on Bills (2d Amer. ed.), 275.

Exceptions sustained.

NICHOLLS v. WEBB.

Supreme Court of the United States, February, 1823. 8 Wheat. 326.

Upon dishonor a foreign bill must be, an inland bill or promissory note may be protested.¹

THE case is stated in the opinion.

[Argument not reported.]

STORY, J. This is a writ of error to the District Court of Louisiana. The suit was brought by Mr. Webb, as indorsee, against Mr. Nicholls, as indorser of a promissory note, dated the 15th of January, 1819, and made by Thomas H. Fletcher, for the sum of \$4880, payable to Nicholls or order, at the Nashville Bank, and indorsed by Nicholls, by his agent, to the plaintiff. The note became due on the 18th of July, which being Sunday, the note, of course, was pay-

¹N. I. L. §§ 135, 169-177.

able on the preceding Saturday.¹ The cause came on for trial upon petition, and answer, according to the usual course of proceedings in Louisiana, the answer setting up, among other things, a denial of due demand, and notice of non-payment; and upon the trial, the jury returned a verdict for the plaintiff. The court thereupon ascertained the sum due, and entered judgment for the plaintiff, according to what is understood to be the usual practice of that State.

Several questions have been argued at the bar, which may be at once laid out of the case, since they do not arise upon the record; and we may, therefore, proceed to examine that alone upon which any judgment was pronounced in the court below.

From the issue in the cause, the burden of proof of due demand of payment, and due notice of the non-payment to Nicholls, rested on the plaintiff. It appears that the demand was made, and notice given, at the request of the plaintiff, by one Washington Perkins, a notary public, who died before the trial. The original protest was annexed to the plaintiff's petition, and contained the usual language in this instrument, stating a demand, and refusal of payment at the Nashville Bank, on the 17th of July, the 18th being Sunday, and that he, the notary, "duly notified the indorsers of the non-payment." Among other evidence to support the plaintiff's case, he offered this protest, together with the deposition of Sophia Perkins, the daughter of the notary. She stated, in her deposition, that her father kept a regular record of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponent to do it, exact copies of the notes, bills, etc.; and in the margin opposite to the copy of the protest made memorandums after notification to indorsers, if any, of the fact of such notification, and the manner; and that his notarial records had been, ever since his death, in the house where she lived. And to her deposition, she annexed, and verified as true, a copy of the protest in this case. The copy of the protest states the demand, most probably by mistake, to have been made on the 19th, instead of the 17th of July, 1819, and contains a memorandum on the margin: "Indorser duly notified in writing 19th of July, 1819, the last day of grace being Sunday, the 18th. Washington Perkins." In other respects the protest is the same in form as that annexed to the petition. To the introduction of this deposition, as well as of the protest, as evidence, the defendant, Nicholls, objected, and his objection was overruled by the court, and the papers were laid before the jury. A bill of excep-

¹ This because the note was entitled to grace, and the third day fell on the 18th, which was Sunday. In such a case, by the law merchant, the note becomes payable on the preceding day, because grace, which was a period of indulgence, was not to be increased. It would be otherwise if the paper were not entitled to grace, and the maturity fell on Sunday or other non-secular day; the instrument would then be payable on the following day. Bigelow, Bills and Notes, 116, 117; N. I. L. § 102.

tions was taken to the decision of the court in so admitting this evidence; and the sole question now before us, is, whether that decision was right. What that evidence might legally conduce to prove, or what its effect might be, if properly admitted, is not now a question before us. It was left to the jury to draw such inferences of fact as they might justly draw from it; and whether they were right or wrong in their inference, we cannot now inquire.

It does not appear that, by the laws of Tennessee, a demand of the payment of promissory notes is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the indorsers. And by the general commercial law, it is perfectly clear, that the intervention of a notary is unnecessary in these cases. The notarial protest is not, therefore, evidence of itself, in chief, of the fact of demand, as it would be in cases of foreign bills of exchange; and in strictness of law, it is not an official act. But we all know that, in point of fact, notaries are very commonly employed in this business; and in some of the States it is a general usage so to protest all dishonored notes, which are lodged in, or have been discounted by the bank. The practice has, doubtless, grown up from a sense of its convenience, and the just confidence placed in men who, from their habits and character, are likely to perform these important duties with punctuality and accuracy. We may, therefore, safely take it to be true in this case, that the protesting of notes, if not strictly the duty of the notary, was in conformity to general practice, and was an employment in which he was usually engaged. If he had been alive at the trial, there is no question that the protest could not have been given in evidence, except with his deposition, or personal examination, to support it. His death gives rise to the question, whether it is not, connected with other evidence, and particularly with that of his daughter, admissible secondary evidence for the purpose of conducing to prove due demand and notice.

The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts of law are, therefore, extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles. Still, however, it is obvious, that as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice; and Lord Ellenborough has very justly observed, that they must expand according to the exigencies of society. *Pritt v. Fairclough*, 3 Camp. Rep. 305. The present case affords a striking proof of the correctness of this remark. Much of the business of the commercial world is done through the medium of bills of exchange and promissory notes. The rules of law require that due

notice and demand should be proved, to charge the indorser. What would be the consequence, if, in no instance, secondary evidence could be admitted, of a nature like the present? It would materially impair the negotiability and circulation of these important facilities to commerce, since few persons would be disposed to risk so much property, upon the chance of a single life; and the attempt to multiply witnesses would be attended with serious inconveniences and expenses. There is no doubt that, upon the principles of law, protests of foreign bills of exchange are admissible evidence of a demand upon the drawee; and upon what foundation does this doctrine rest, but upon the usage of merchants, and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers; but it is here extended to foreign officers acting as the agents and instruments of private parties.

The general objection to evidence of the character of that now before the court, is, that it is in the nature of hearsay, and that the party is deprived of the benefit of cross-examination. That principle also applies to the case of foreign protests. But the answer is, that it is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence cannot guard us against the effects of human mortality? Vast sums of money depend upon the evidence of notaries and messengers of banks; and if their memorandums, in the ordinary discharge of their duty and employment, are not admissible in evidence after their death, the mischiefs must be very extensive. . . .

(Authorities upon the admissibility of secondary evidence here considered.)

We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is of course liable to be impugned by other evidence; and to be encountered by any presumptions or facts which diminish its credibility or certainty. *A fortiori*, we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with a public authority and confidence.

It is, therefore, the opinion of the court, that the evidence excepted to in this case was rightly admitted. The variance between the copy and the original protest, as to the time of the demand,

might have been explained to the satisfaction of the jury at the trial; but it forms no ground upon which this court is called upon to express any opinion.

Judgment affirmed, with costs.

NOTE. — By the law merchant, in the case of a foreign bill, protest was a necessary step, and the dishonor of the bill could be proved only by the notary's certificate, if it was in existence and could be produced. *Ocean Bank v. Williams*, 102 Mass. 141. In the case of inland bills or promissory notes, the step, though permissible, was not necessary, and the certificate of protest of such instruments was not the "best" evidence; it might, however, be introduced as secondary evidence to prove the dishonor, as in *Nicholls v. Webb*, *supra*. So, in the case of a foreign bill, inasmuch as it was no part of the official duty of the notary to give notice of dishonor, a statement in the certificate of protest that notice had been given was not received as evidence of that fact. Statutes have very generally made the certificate of protest of all instruments *prima facie* evidence of all facts stated therein, including notice of dishonor. See Rev. Laws, Mass. ch. 73, § 13; Bigelow, *Bills and Notes*, ch. x. § 1.

THE WINDHAM BANK v. NORTON.

Supreme Court of Connecticut, July, 1852. 22 Conn. 213.

Failure of presentment at maturity is excused by any inevitable or unavoidable accident, not attributable to the fault of the holder, provided he make presentment as soon thereafter as practicable.¹

ASSUMPSIT against indorsers of a bill of exchange, drawn by George Hobart, of Norwich, Connecticut, upon Mansfield, Hall, & Stone, of Philadelphia, and by them accepted, for \$417.26; dated January 31, 1849, and payable four months after date, to the order of the defendants.

The facts were found by the court, by agreement of the parties, as follows: Said bill of exchange was, on the day of its date, accepted by said Mansfield, Hall, & Stone, "payable at the Farmers and Mechanics' Bank," in the city of Philadelphia. On the — day of February, 1849, the defendants procured said draft to be discounted by the plaintiffs, and then indorsed and delivered it to them. During the same month of February, the plaintiffs forwarded said draft, by the United States mail, to the Ohio Life and Trust Co., a banking corporation in the city of New York, for collection, and indorsed the same to their cashier, as follows: "Pay G. S. Coe, Esq., cashier, or order;" signed, "Samuel Bingham, cashier." The bill, so indorsed, was, in a day or two thereafter, and in due course of mail, received by said Ohio Life and Trust Co. The third day

¹ N. I. L. §§ 98, 99. So of notice of dishonor, *id.* §§ 129, 130; and of protest, § 176.

of grace, June 3, being Sunday, the draft was actually due and payable on Saturday, June 2. During the year 1849, there were two mails per day, each way, between New York and Philadelphia, those for the latter place leaving New York, one at nine A. M.; the other at four and a half P. M., and both due at Philadelphia in five hours from their departure. The Farmers and Mechanics' Bank were the Philadelphia correspondents of the Ohio Life and Trust Co., and communications by mail passed between them daily. On the morning of June 1, the cashier of the Ohio Life and Trust Co. enclosed this draft with others, addressed in the proper and usual mode, to the Farmers and Mechanics' Bank, and deposited said letter in the United States post-office, at the city of New York, in season for the afternoon mail of that day for Philadelphia. That letter was duly deposited in said mail, and said mail left New York, and arrived at Philadelphia in due and usual time; but the mail-bags containing the letters for Philadelphia were, by the post-office clerks in the office at New York, marked to be forwarded to Washington, and were, therefore, not delivered at Philadelphia, but carried to Washington. At Washington the mistake was discovered, and said mail-bags forwarded to Philadelphia, which place they reached in the course of Sunday, June 3. On the morning of the next day said letter, with the draft enclosed, was delivered from the post-office at Philadelphia to said Farmers and Mechanics' Bank, who, by their cashier, refused payment of the same, and between the hours of nine and ten A. M. of the day placed said draft in the hands of a notary public, for protest. Said notary, between the hours of nine A. M. and three P. M. of said day, presented said draft at the counter of said bank for payment, and received for answer from said cashier that he was ordered by the acceptors not to pay it, and that, had he presented it on Saturday, June 2, he should have given him the same answer. Said notary thereupon, on said fourth day of June, in due and proper form, protested said draft, and made out written notices to the drawer and the several indorsers of the non-payment of said draft, and enclosed said notices, with the notice of protest, in a letter, and on the same day deposited the same in the post-office in said Philadelphia, duly addressed to George S. Coe, cashier of Ohio Life and Trust Co., New York, who had indorsed said draft to the Farmers and Mechanics' Bank, and by whom said letter was, in due course of mail, received. Said Coe, on the same day on which he received them, enclosed said letter of protest and said notices, except the one to himself, in a letter duly addressed to the plaintiffs, and deposited the same in the city of New York in season for the next mail. The same was, in due course of mail, received by the plaintiffs, who, on the day of the receipt thereof, enclosed said notices to the defendants, as indorsers, and said notice to said drawer (his residence being unknown), in a letter duly addressed to the defendants,

and deposited it in the post-office at Windham, in season for the next mail, and the same was, in due course of mail, received by the defendants. Mansfield, Hall, & Stone became insolvent, and suspended payment on the twelfth day of April, 1849, and on the next day sent to the Farmers and Mechanics' Bank the following notice in writing:

"E. N. LEWIS, Esq., Cash.

You will please pay no more notes or drafts drawn by us, and payable at your bank, until further notice, as they will not be provided for.

Very respectfully yours,

MANSFIELD, HALL, & STONE."

No further notice was sent, and said bank, from that time forward, acted upon this order, and refused payment of all notes or drafts, payable at the bank, by said firm. The business hours of the Philadelphia banks were, in 1849, from nine A. M. to three P. M. Owing to the miscarriage of the United States mail, as above stated, said draft was not presented for payment on Saturday, June 2, when it became due, and was never presented for payment at any other time than on said fourth day of June.

It has been the usage of the banks and merchants of this country, for the last forty years, to make use of the United States mail in forwarding negotiable notes and bills of exchange, for collection or acceptance. It is the custom of the Windham Bank, and the four Norwich banks, to forward all paper in their hands, payable abroad, within five or eight days after it comes into their hands, without reference to the length of time it has to run.

The questions of law arising upon these facts, and on such further facts as the jury might rightfully infer, were reserved for the advice of this court.

[Argument reported.]

STORRS, J. The defendants first insist that the averments in this declaration, of a due presentment of the draft in question and notice of its non-payment, must be strictly proved, and that they are not sustained by proof of the facts set up by the plaintiffs by way of excuse. Whatever may be the course of authorities elsewhere, it is well settled here that those allegations are supported by evidence of matter of excuse, or a waiver of demand and notice.¹ *Norton v. Lewis*, 2 Conn. 479, and *Camp v. Bates*, 11 Conn. 487, are decisive on this point.

The other and more important question in this case is, whether

¹ See *Armstrong v. Chadwick*, 127 Mass. 156.

the plaintiffs are excused for the non-presentment of this draft for payment on the day when it became due. The last day of grace being Sunday, it was payable on the preceding Saturday, which was the second day of June, 1849. This question depends on whether the plaintiffs are chargeable with negligence in not presenting it on that day.

If the agent of the plaintiffs, to whom they sent it to be forwarded for presentment and collection, and who transacted this business for them, was guilty of such negligence, it is, of course, imputable to the plaintiffs. And it is not important to this question either that the defendants, in fact, sustained no damage by the draft not having been presented for payment when it fell due,¹ or that it would not have been paid by the acceptor, if it had then been presented. The indorser, on a question of due presentment for payment, is not affected by either of these circumstances. Nor, indeed, do the plaintiffs claim to recover on either of these grounds.

The question of negligence here presented depends on the inquiry whether, under the circumstances of this case, the delay of the plaintiffs' agent in not forwarding this draft to Philadelphia until the last mail left New York for that place, on the day next preceding that on which the draft fell due, constituted a want of reasonable or due diligence in regard to its presentment. We say under the circumstances, because there is no positive or absolute rule of law which determines within what precise time the holder of a bill of exchange must, in all cases whatever, or at all events, avail himself of the authorized mode of transmission adopted in this instance, to forward such paper for presentment. The general principle, established by all the adjudged cases, as well as the approved elementary writers, is, that reasonable diligence in the presentment of a bill for payment is required of the holder, and that, therefore, if there has been no want of such diligence, he is excused. Story, Bills, c. 10; Chitty, Bills, c. 9, 10; Story, Prom. Notes, c. 7, § 368; *Patience v. Townley*, 2 Smith, 223, 224.

In applying this principle, the general rule is, that it must be presented for payment on the very day on which, by law, it becomes due, and that, unless the presentment be so made, it is a fatal objection to any right of recovery against the indorser. But, although this is the general rule, it is not a universal one, and prevails only under the qualification, which is really a part of the rule itself, that there is no negligence, or want of reasonable diligence, in not making such presentment. The whole rule, therefore, more properly stated, is, that the presentment must be on the day on which the bill becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it. By the very statement of this rule, as thus fully expressed, it is plain that, on the question whether the

¹ See *Foster v. Parker*, 2 C. P. D. 18, *post*, p. 304.

holder is excused on this ground for not thus presenting it, or, in other words, whether there was negligence on his part, or a want of reasonable diligence, no absolute or positive rule can, from the nature of the case, be laid down which shall apply under all circumstances. We have no evidence of any general custom of merchants in regard to the precise time within which mercantile paper is usually forwarded, in order to be presented for payment, so that the law merchant furnishes us no guide on this point. And it is clear that the strict rule of the common law, by which an inability to perform the terms or condition of a contract, by reason of inevitable accident or casualty, constitutes generally no excuse for their non-performance, is not applicable to mercantile instruments of this description. Therefore, the excuse for non-presentment in this case presents the ordinary question of negligence. That question may, and often does, depend on such a variety of circumstances, or those of such a peculiar character, that it is very difficult, if not impossible, to reduce them to any fixed or invariable rule. But, in regard to such a question, as applicable to the non-presentment of a bill or note when it is due, it is considered a well-settled rule that such want of presentment is excused by any inevitable or unavoidable accident not attributable to the fault of the holder, provided there is a presentment by him as soon afterward as he is able; by which is intended that class of accidents, casualties, or circumstances which renders it morally or physically impossible to make such presentment. Judge Story, in speaking of this ground of excuse, says: "It has been truly observed by a learned author," referring to Mr. Chitty, "that there is no positive authority in our law which establishes any such inevitable accident to be a sufficient excuse for the want of a due presentment. But it seems justly and naturally to flow from the general principle, which regulates all matters of presentment and notice, in cases of negotiable paper. The object, in all such cases, is to require reasonable diligence on the part of the holder; and that diligence must be measured by the general convenience of the commercial world, and the practicability of accomplishing the end required, by ordinary skill, caution, and effort." And he cites the remark of Lord Ellenborough, in *Patience v. Townley*, 2 Smith, 223, 224, that due presentment must be interpreted to mean, presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within regular time. Story, *Bills*, § 258.

Applying these principles to this case, we are of opinion that the plaintiffs are not chargeable with a want of reasonable diligence.

No fault or impropriety is imputable to them, by reason of their having selected the public mail as the mode of forwarding the draft in question, to the bank in Philadelphia, where it was payable. It

is properly conceded by the defendants that such mode of transmission was in accordance with the general commercial usage and law, in the case of paper of this description. Indeed, it is recommended in the books as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance. But, although the public mail was a legal and proper mode by which to forward this paper, it was their duty to use it in such a manner that they should not be chargeable with negligence or unreasonable delay. If, therefore, they put the draft into the post-office at so late a period that, by the ordinary course of the mail, it could not, or there was reasonable ground to believe that it would not, reach the place of its destination in season for its presentment when due, we have no doubt that there would be, on their part, a want of reasonable diligence, which would exonerate the indorser. On the other hand, to throw the risk of every possible accident, in that mode of forwarding the draft, upon the holder, where there has been no such delay, would clearly be most inconvenient, unreasonable, and unjust, as well as contrary to the expectation and understanding of the indorser, who is presumed to be aware of the general usage and law in regard to the transmission, by mail, of this kind of paper, and must therefore be supposed to require only reasonable diligence in this respect on the part of the holder; and would, indeed, be inconsistent with the rule itself, which sanctions its transmission in that manner. It has been suggested that the principle should be adopted, that when the holder resorts to the public mail, he should be required to forward the presentment at so early a period, that if by any accident it should not reach the place of its presentment in the regular course of the mail there should be time to recall it, and have it presented when and where it falls due; or that, at least, it should be forwarded in season to ascertain whether it reached there by that time, and to make such a demand or presentment for payment as is required in the case of lost bills. We find no authority whatever for any such rule, nor would it, in our opinion, comport with the principle now well established, requiring only reasonable diligence on the part of the holder, or with the policy which prevails in regard to such commercial instruments. It would, in the first place, be the means of restraining the transfer of such paper within such a limited time as to impair, if not to destroy, its usefulness and value, arising out of its negotiable quality; and, in the next place, it would in many cases be wholly impracticable. The casualties incident to this mode of transmission are most various in their character, and cannot, of course, be foreseen; and they might, in the case of forwarding mercantile paper, be such as to render it impossible to ascertain its miscarriage, or to recall it in season to remedy the difficulty. In the case of the draft now before us, for example, if it had been placed by the plaintiffs in the post-

office at Windham, where they were located, and transacted their business, for transmission direct from thence to Philadelphia, on the very day when they became the holders of it, which was between three and four months before it became due, and, by an accident or mistake of the postmaster in the former place, similar to that which occurred in this case at New York, it had been mailed to one of the most distant parts of our country, or to a foreign country (which would not have been more singular than that it should have been mistakenly mailed, as in the present case, for Washington), it might not have been practicable for the plaintiffs to learn the accident, or obviate its effect, before the paper fell due. In short, such a rule as that suggested would be merely artificial in its character, productive of great inconvenience and injustice in particular cases, without any corresponding general benefits, and change the whole course of business in regard to a most extensive and important class of mercantile transactions. Nor has any other arbitrary or positive rule been suggested which is not equally obnoxious to the same or similar objections.

The only remaining inquiry is, whether the plaintiffs are chargeable with negligence for not forwarding the draft in question by an earlier mail from New York to Philadelphia. It was sent by the usual, legal, and proper mode. It was deposited in the post-office in season to reach the place where it was payable, before it fell due, by the regular course of the next mail; and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place when it should have done, but was carried beyond it in consequence of that mistake. As that mistake could not be foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed, they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the package until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination was, therefore, so far as the plaintiffs were concerned, an unavoidable accident. It happened, not in consequence of any delay of the plaintiffs in putting the draft into the post-office at so late a period that it could not, or probably would not, reach its destination in due season, but merely in consequence of the act of the official to whom it was properly confided, done after it was properly in his charge, by the plaintiffs, for transmission. The accident, moreover, was of a very peculiar and extraordinary character, and quite different from those which are ordinarily in-

cident to that mode of transmission, and against which it would be extremely difficult, if not impossible, to guard. It would have been equally liable to occur at any time when the draft should have been placed in the post-office. It was not owing in any sense to the fault of the plaintiffs, but solely to that of the postmaster. Under these circumstances, we do not feel authorized to impute any blame or negligence to the plaintiffs. We are, therefore, of opinion that judgment should be rendered for the plaintiffs.

In this opinion the other judges concurred.

Judgment for the plaintiffs.

LEHMAN v. JONES.

Supreme Court of Pennsylvania, May, 1841. 1 Watts & S. 126.

If the maker of a promissory note absconds before the maturity of the note, this will excuse the holder from making presentment at his last place of residence; notice of dishonor, however, is not excused.

ASSUMPSIT against Lehman and Stroh, as indorsers of a promissory note.

It was proved that Robinson, the maker of the note in suit, had absconded to parts unknown and had not returned. The objection was that no demand was made upon Robinson, and that the notice was informal.

The court below thus instructed the jury:

PARSONS, President. The court instruct the jury, as a matter of law, if they believe that Robinson absconded in December, 1835, as testified to by his mother, and did not return before the note became due, nor since, it was not requisite that the holders of the note should go to Jonestown, and attempt to make a demand upon him in order to charge the indorsers; provided the indorsers were cognizant of the fact that the drawers had left the State, of which there would seem to be no doubt, if the testimony of Mrs. Robinson is believed.

[Argument not reported.]

*Per Curiam.*¹ The rule in *Lambert v. Oakes* (1 Ld. Raym. 443) is, that the holder must have demanded, or done his endeavor to demand, the money. But the law is not so unreasonable as to require an impossibility;² and therefore it is said (Id. Anon. 743), that where the drawee of a bill has absconded before the day of payment, notice of the fact is equivalent to notice of demand and dishonor. In *Duncan v. McCullough*, 4 Serg. & Rawle, 480, the principle was

¹ Gibson, C. J., Rogers, Huston, Kennedy, Sergeant, JJ.

² N. I. L. § 99, 1.

recognized as being applicable to a promissory note; and it has been established by direct decision in some of our neighboring States. It would have been idle for the plaintiff to demand payment at the late residence of Robinson, the drawer, after he had absconded. Where, indeed, the drawer of a note or the drawee of a bill has merely removed from the place of his residence, indicated by the bill, it is the business of the holder to inquire for him and ascertain where he has gone, in order that he may follow him;¹ but when he has secretly fled, an application at the place would lead to no information in respect to him; and the law requires nothing which is nugatory. The other errors are either resolvable by this precedent, or are plainly unfounded.

Judgment affirmed.

HALE v. BURR.

Supreme Court of Massachusetts, March, 1815. 12 Mass. 86.

Where the person required to pay, is dead at the maturity of the instrument, presentment is not excused, but should be made upon his personal representative, unless the maturity of the instrument happens within a year after the appointment of the representative.²

ASSUMPSIT by the indorsee against the defendant as indorser of a promissory note, signed by Joseph Francis, payable to the defendant or his order, in sixty days and grace, dated August 1, 1812.

At the trial of the action, which was had before the present Chief Justice, November term, 1813, on the general issue, it was in evidence, that Joseph Francis, the promisor, died on the 4th of September, 1812, and that administration of his estate was duly committed to William Dodd on the 14th of the same September, and that he gave legal notice of his appointment. The note was lodged in the Union Bank, in Boston, for collection. At the time it fell due, the runner of the bank left a notification at the counting-room formerly occupied by the said deceased, and where he usually did business. No demand was made upon the said administrator, who lived, and had a place of business, in Boston, which was known to the runner, by whom notice was given to the defendant.³

¹ It is not necessary, however, that the holder should follow the maker or drawer out of the State; in such a case presentment at his last place of abode or of business within the State, is all the indorser can require. *Taylor v. Snyder*, 3 Den. 145, *ante*, p. 213; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Wheeler v. Field*, 6 Met. 290. In Massachusetts it has been settled, overturning prior cases, that in the case of absconding, presentment should be made at the last place of business or abode. *Pierce v. Cate*, 12 Cush. 190.

² Cf. N. I. L. § 93.

³ Observe that notice *was* given; probably notice is necessary in such case, though presentment and demand be excused.

One Dench, the former clerk of the deceased, at the request of the creditors, took care of the property of the deceased, and occasionally went to the counting-room, until the said Dodd was appointed administrator. The said Dodd then took all the books and papers of the deceased to his own store, and took the sole charge of his other property. Before the note became due, all the property of the deceased was sold and delivered; and the counting-room was not used for some time before. The estate of the deceased was proved to be insolvent.

A verdict was returned for the defendant by direction of the judge; and it was agreed, that, if the court should be of opinion that a demand upon the administrator, under the circumstances of this case, was not necessary to entitle the plaintiff to recover, the verdict should be set aside, and the defendant should be defaulted; otherwise, that judgment should be rendered on the verdict.

[Argument not reported.]

PARKER, C. J. The question presented in this case is, whether an indorsee of a negotiable promissory note can maintain an action against the indorser, the promisor having died, and an administrator having been appointed and duly qualified to act, before the day of payment, without proving a demand upon such administrator at the maturity of the note. Whether such demand was actually made or not, according to the usage of the bank where the note was left for collection, was a question for the jury; and by the verdict it is established that none was made. But, as the jury were instructed that such a demand was necessary, if that instruction was not right, the verdict must be set aside.

And we are all of opinion that the instruction was wrong; and that it is not necessary, to charge the indorser, that a demand should be made of the administrator. The authorities cited by the defendant's counsel¹ go merely to prove, that, in order to obtain a protest of a bill of exchange, or to charge the drawer or indorser, if the payer be dead, it is incumbent on the holder to present the bill to his personal representative, if he live within a reasonable distance.

From the strong analogy subsisting between bills of exchange and promissory notes, it is possible that this rule of law may be as applicable to the latter species of contract as to the former. Yet no authority has been cited to show that the rule has been applied to promissory notes, or to any instrument other than a foreign bill of exchange, where by the law merchant a protest is necessary.²

¹ Chitty on Bills, Story's ed., 172, 182; Molloy, L. 2, c. 10, § 34; Pothier, 146.

² But see Chitty on Bills, 6th ed., 246-262; Bayley on Bills, 5th ed., 219; Thomson on Bills, 444; Price v. Young, 1 Nott & M'Cord, 438; Roscoe, Ev. 158, 2d ed.; 2 Phil. Ev. 22.

In England, however, there may be reasons for making a demand upon an executor or administrator of a deceased promisor in a note necessary, which do not exist in this country; and, if the reasons upon which the law is founded do not exist, there is no cause why we should not decide according to the nature and spirit of the contract.

In this State a demand upon an administrator would, in most cases, be entirely nugatory. He is not obliged to pay any debt of the deceased, except such as are particularly privileged, until a year from his appointment.¹ If sued within the year, he is entitled to a continuance, of course. This indulgence is given to enable him to collect the effects of the deceased, and to ascertain their sufficiency to discharge all the debts. If there should be a deficiency, a general distribution takes place among all the creditors, without regard to the character of their demands, unless in the few excepted cases above alluded to. Under these circumstances, should he pay any debt, and it should afterwards appear that the estate is insolvent, he pays at his peril. A prudent executor or administrator will, therefore, seldom hazard the payment of a debt before he has ascertained the situation of the estate; and a demand upon him would be sure to meet with a refusal. Such a demand would, therefore, be merely a troublesome formality, without any use; and notice to the indorser, that (the promisor being dead) he will be looked to for payment, will in every respect be as advantageous to him as a previous demand upon the promisor.

It is well settled, that, if the promisor abscond before the day of payment, or has concealed himself, the necessity of a demand is taken away.² Due diligence to find him is all that is required in the latter case; and, in the case of absconding, even that is not necessary.³ When the party is dead, and his representative is not obliged to pay his debts for a year after he assumed the trust, it would seem as idle to require a demand of him as it would be to pursue one who has absconded.⁴

¹ Rev. Laws, ch. 141, § 1.

² Chitty, 70; Ld. Raym. 743.

³ Putnam v. Sullivan, 4 Mass. 45; Widgery v. Munroe, 6 Mass. 449; Whittier v. Graffam, 3 Greenl. 82. This rule, as to the effect of absconding, was overturned in Massachusetts in *Pierce v. Cate*, 12 Cush. 190, in which it was held erroneous to instruct the jury that if the maker had absconded, leaving no visible property subject to attachment, no presentment of the note to the maker, or demand at his dwelling-house, or other inquiry for him, was necessary. It was said by Shaw, C. J.: "If the maker has left the State, the holder must demand payment at his actual or last place of abode, or of business, within the State. *Wheeler v. Field*, 6 Met. 290." This is the general rule in cases where the principal debtor has removed his domicile to another State; but is *contra* to the weight of authority in cases of absconding. See Daniel, Neg. Instr., 5th ed., § 1144. Cf. N. I. L. § 165, as to excuse of presentment for acceptance.

⁴ Thomson on Bills, 444.

In England there may be more reason for requiring such demand; for there the representative is at liberty to pay the debts, although there should not be enough to pay all, if he has regard to their rank and degree; and he may always discharge himself by showing that he has paid away all that he has received. He may, therefore, pay a bill of exchange, or promissory note, when called upon. But in this country it is otherwise; for, where the estate is insolvent, as in the present case, there is no reason to presume that a demand would be effectual.

We do not decide, that, when a note shall fall due after the expiration of the time allowed the executor or administrator, by our statute, upon an estate not represented insolvent, a demand upon him, or due diligence to make one, must not be proved. But in the present case we are satisfied that no such demand was necessary. The verdict must, therefore, be set aside, and the defendant be called.¹

Defendant defaulted.

NOTE. — The doctrine of *Hale v. Burr*, *supra*, was criticised in *Gower v. Moore*, 25 Me. 16, in which case Mr. Justice Shepley said: "This is a suit by the indorsee against an indorser of a promissory note, made on August 12, 1841, and payable in two years. Before it became payable the maker had deceased, an administrator had been appointed, the estate had been represented to be insolvent, commissioners of insolvency had been appointed and the holder of the note had proved it before them. When the maker of a note dies, before it becomes payable, the holder should make inquiry for his personal representative, if there be one, and present the note on its maturity to him for payment. The case of *Hale v. Burr*, 12 Mass. 86, may be considered as presenting an exception to this rule; but doubts have been expressed, whether it could be considered as either correct in principle, or founded upon sufficient authority.

In this case the indorser may be considered as knowing that the note would not be paid on presentment, and that the estate was insolvent. But such knowledge does not relieve the holder from his obligation to make presentment and give due notice of dishonor. The promise of the indorser is a conditional one to pay, if the note be duly presented to the maker and seasonable notice be given to him of its dishonor.

The holder cannot assume the right to decide that his performance of the condition will be of no service to the indorser, and thus put that matter in issue to relieve himself from the performance of the condition imposed upon him by law. *Nicholson v. Gouthit*, 2 H. Bl. 609; *Clegg v. Cotton*, 2 B. & P. 239; *Prideaux v. Collier*, 2 Starkie, 57.

The various relations which the parties, whose names are upon negotiable paper, sustain towards other persons, whose names are not upon it, cannot be anticipated. The real debtors, who may feel obliged to pay, may not wish to exhibit themselves as such. A deceased party may possibly have held a contract of some responsible person to pay in case the note should be duly presented for payment. So may an indorser. To hold an indorser liable and yet deprive him of the benefit of such a contract could not be justified. It is best for a commercial community that the rules be simple, subject to few excep-

¹ *Burrill v. Smith*, 7 Pick. 291.

tions, and not liable to be varied to meet the apparent injustice of particular cases."

The Massachusetts cases seem hardly consistent. If presentment is necessary when the maker has absconded, to the knowledge of the indorser, why should it not be made in such a case as that of *Hale v. Burr, supra*? In *Pierce v. Cate*, 12 Cush. 190, 192, Chief Justice Shaw lays down what is believed to be the true doctrine; he said: "We are aware that in some of the earlier cases in Massachusetts, it was held that proof that the maker had absconded, or failed, and become insolvent, so that a demand would be unavailing, would be an excuse of presentment. *Putnam v. Sullivan*, 4 Mass. 45. But it has been decided, on consideration, and upon principle, that the obligation of an indorser is conditional; that is, that he will be answerable, if at the maturity of the note the holder will present it to the maker for payment; and if thereupon the maker shall neglect or refuse to pay it, and the holder will give seasonable notice to the indorser, he will pay it himself. *Sandford v. Dillaway*, 10 Mass. 52; *Farnum v. Fowle*, 12 Mass. 89. These are the conditions of his liability. The holder, therefore, to charge the indorser, must show a compliance with these conditions, or that proper means have been taken to effect a compliance with them, unless, indeed, he can prove a waiver of them by the indorser."

If the productiveness of the demand be the test of its necessity, demand upon the administrator of a solvent estate is quite as likely to be availing, as presentment at the last place of business or abode of one who has absconded; but the productiveness of the demand is not the test.

FOSTER v. PARKER.

Common Pleas Division of England, November, 1876. 2 C. P. D. 18.

That an indorser of a bill of exchange was not damnified by failure to take steps at maturity, or upon dishonor, is no excuse.

ACTION on a bill of exchange by an indorsee against an indorser. Statement of defence, want of notice of dishonor. Reply: That neither at the time when the bill was drawn, nor afterwards, nor when it became due and on presentment thereof, had the acceptor, or the drawer, or any indorser prior to the defendant, any effects of the defendant in his hands, and the said bill was drawn by the drawer and accepted by the acceptor and indorsed by the defendant and by the prior indorsers for the purpose of raising money for the defendant, the drawer, the acceptor, and the said persons who indorsed before the defendant, jointly; and the defendant was in no way damnified even if there was no notice of dishonor. Demurrer and joinder.

[Argument reported.]

DENMAN, J. I am of opinion that our judgment should be for the defendant. I think the allegation in the reply, that the defendant

was in no way damnified by want of notice of dishonor, must be treated as an allegation of law, a mere conclusion from the previous allegations. Then, are those allegations sufficient to make the reply good? In the case of *Bickerdike v. Bollman*, 1 T. R. 405, it was held that no notice of dishonor was necessary; but in all the subsequent cases on the subject it is laid down that the doctrine in that case ought not to be extended; and that, with regard to an indorser, to excuse notice of dishonor facts must be stated which show, not as a mere possibility but as an absolute certainty, that he could not be damnified by the absence of such notice. The facts alleged in the reply only show that the drawer, acceptor, and prior indorsers of the bill were jointly interested with the defendant in some transactions for the purposes of which the amount of the bill was to be raised. It seems to me that so far from these facts making out that the defendant could not be damnified by want of notice of dishonor, the *prima facie* inference from them is that he would be. All the parties being interested jointly, *prima facie* if the defendant had to pay the whole amount of the bill he would be entitled to contribution from the other parties. The authorities cited in argument all show that the principle of *Bickerdike v. Bollman*, 1 T. R. 405, cannot be extended to the case of an indorser, unless it is clearly made out that under no circumstance could he be prejudiced by absence of notice. The allegations in the reply do not make this out.

LINDLEY, J. To disentitle the defendant as the indorser of a bill of exchange to notice of dishonor the plaintiff must show that it was the defendant's duty, as between himself and the other parties to the bill, to provide for it. It is obvious that the court cannot come to the conclusion that the defendant was, as between himself and the other parties to this bill, bound to provide for it from the averments in this reply. Indeed, the *prima facie* inference from them would be that he was not. The case therefore does not come within the authority of the cases in which notice of dishonor has been excused. With regard to the general allegation that the defendant was not damnified by absence of notice of dishonor, it seems to me insufficient as being too vague. It might mean that the other parties to the bill would not have been able to pay. He would be damnified in the legal sense if he had a remedy over against any of them and was not bound, as between himself and them, to meet the bill. For these reasons I agree that our judgment should be for the defendant.

*Judgment for the defendant.*¹

¹ See *Turner v. Samson*, 2 Q. B. D. 23. As to *Bickerdike v. Bollman*, 1 T. R. 405, cited *supra*, see *Hopkirk v. Page*, 2 Brock. 20; *Bigelow*, L. C. Bills and Notes, 96, 97.

GILBERT *v.* DENNIS.

Supreme Court of Massachusetts, March, 1842. 3 Met. 495.

The party required to pay may waive steps to which he has a right, to wit, presentment and demand; and his waiver will dispense with the necessity of taking these steps to charge an indorser.

ASSUMPSIT by the indorsee against the indorser of a promissory note. The facts are stated in the opinion.

[Argument not reported.]

SHAW, C. J.

It appears by the report, in the present case, that on the last day of grace, the promisor went to the store of the holder, where the note was, and stated that he was unable to pay, and should not pay the note, and wished the plaintiff to notify the indorser. The court are of the opinion that this was a sufficient demand and refusal to constitute a dishonor of the note. There are many cases, in which it is held that it is not necessary to produce and exhibit the note. As where a note is in terms, or by tacit or express consent of the parties, payable at a bank, it is sufficient that the note is there ready to be given up on payment, should the promisor come to pay it. *State Bank v. Hurd*, 12 Mass. 172; *Whitwell v. Johnson*, 17 Mass. 449; *Saunderson v. Judge*, 2 H. B. 506. If the promisor does not go to the bank and pay the note, it is dishonored, and it would be an idle ceremony, to take the note from the files and make a demand, when there is no one on whom to make it. And should the promisor come and declare his inability to pay, his intention not to pay, and leave without payment, it is surely not less a dishonor than if he had stayed away. The default of the promisor, in such cases, is his not paying the note at the bank; and the default of the promisor, in whatever it consists, constitutes the dishonor of the note, upon which the indorsee, if duly notified, may be legally charged.

In the present case, the plaintiff held the note, the promisor knew it, knew it was due, and instead of waiting for the holder to come to him, he went to the holder, declared by his conduct that he knew the note was due and payable, and that the holder had the note ready to be given up, and expected and had a right to expect payment of him as promisor; and in anticipation of a presentment and express demand, declared that he could not pay the note, and departed without paying it. It does not appear that the holder did not request him to make payment; and the circumstances are such as to warrant the inference that he did. The declaration of the promisor, that he could not pay, implies that he considered the holder as looking to him

for payment, which is all that was necessary, and that he anticipated a more formal offer of the note and demand of payment, by a declaration which rendered it unnecessary. . . .

[A question of notice, see *ante*, p. 254.]

NOTE. — The analogy is not perfect between cases of instruments payable at a bank and such a case as that of *Gilbert v. Dennis*, *supra*. When the instrument is payable at a bank, the presence of the paper in the bank, at maturity, to the knowledge of the bank, is an *equivalent* of a formal presentment, based upon custom, and recognized as such by the law merchant. *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641, *ante*, p. 222.

Gilbert v. Dennis presents a case of waiver, that is, waiver by the primary debtor of a presentment and demand upon him by the holder. It is not, however, directly a waiver of the indorser's right to have these steps taken. The party required to pay has the right to have the instrument exhibited to him before he can be compelled to pay it, *Musson v. Lake*, *ante*, p. 205, and this right he may waive. It is but an incident that, by his waiver, the indorser's right is destroyed.

BERKSHIRE BANK v. JONES.

Supreme Court of Massachusetts, September, 1810. 6 Mass. 524.

The taking of steps may be waived by the indorser;¹ but a waiver of notice merely is not a waiver of presentment and demand.²

THE plaintiffs declare on a promissory note made by one Amasa Glesen, on the 21st of October, 1807, by which he promised the defendant to pay him or his order \$125, at the Berkshire Bank, in sixty-one days; and on an indorsement by the defendant, he waiving all right to the notice, to which, by law or custom, he was entitled as indorser. The plaintiffs also allege a request and refusal by Glesen, the maker, and also notice to the defendant.

The action was tried before SEDGWICK, J., who directed a nonsuit, subject to the opinion of the court, whether it was necessary to the support of this action, that, previous to the commencement thereof, the contents of the note declared on should have been demanded of the promisor.

[Argument not reported.]

PARSONS, C. J. The defendant has argued that, although he waived notice of a refusal of payment by the maker, yet he did not thereby dispense with a demand upon him; for he might waive the notice from a confidence that the maker would pay the note on demand.

¹ N. I. L. §§ 126, 127.

² Cf. *Id.* § 128, that waiver of protest is a waiver of all steps, whether in the case of a foreign bill or other negotiable instrument.

This construction of the waiver we think correct; and the objection would be conclusive, if the indorsement had not been made to the plaintiffs, at whose office the note was to be demanded and paid. The note was payable on a day and at a place certain; and the place is the Berkshire Bank. A demand of payment need not be made at any other place; and if the holder of the note is at the bank on the prescribed day, ready to receive the money, if the maker be there, it is enough for him. And if the maker does not come to the bank, or direct the payment there, he has broken his promise; and no other notice to him is necessary.

In the case at bar, as the plaintiffs held this note, we must presume it was in their bank, and there it was made payable. They were not to look up Glesen, or to demand payment of him at any other place. The defendant, by his indorsement, guaranteed that on the day of payment the maker would be at the bank, and pay the note; and if he did not pay it there, he agreed that he would be answerable in a suit at law, without previous notice of the default of the promisor.

Although we are satisfied that the judge was correct in his construction of the terms of the defendant's waiver of notice, considered in a general view, yet we are of opinion that, from the special tenor of the note declared on, the nonsuit ought to be set aside; and if, on the trial, the plaintiffs can show that on the day of payment the note was in the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours, to receive payment and give up the note, they will be entitled to recover, as, by the terms of the note, they were not holden to demand payment but at the bank, which was impracticable through the default of the maker; and by the defendant's waiver he cannot claim notice.

ANNVILLE NATIONAL BANK *v.* KETTERING.

Supreme Court of Pennsylvania, May, 1884. 106 Penn. State, 531.

The waiver may be written or oral, though made at the time of indorsement.

ASSUMPSIT by the indorsee of a promissory note against the indorser.

The note was made by one Urich, payable to the defendant or order, and by him indorsed to the plaintiff. It was proved by the plaintiff, that when the defendant began dealing with the bank, he said that he did not wish to have any notes, discounted for him, protested, as he wanted to save the cost. Accordingly the plaintiff had never protested the notes indorsed by the defendant, nor had it made demand nor given notice of dishonor of his notes; and it did not

demand payment nor protest the note in suit. Verdict was for the defendant, and the plaintiff brought writ of error.

[Argument reported.]

STERRETT, J. No principle of the law merchant is better settled than that demand and notice of the non-payment of a negotiable note may be waived by the indorser, either orally or in writing, or by acts clearly calculated to mislead the holder and prevent him from treating the note as he otherwise would, but there is some diversity of opinion as to what constitutes a waiver of these necessary prerequisites to charge the indorser. When a written waiver of "demand and notice" accompanies the indorsement, or is given by the indorser before maturity of the note, there can be no question as to its legal effect; nor can there be any doubt when the language employed clearly imports or implies the same thing. It has been doubted, however, whether the words "protest waived," written on a note by the indorser, or his separate request in writing not to protest it, is a waiver of both demand and notice, and in some cases these words have been considered insufficient to dispense with either; but the weight of both reason and authority is that they do constitute a waiver of both.¹ Strictly speaking, the term "protest" applies only to foreign bills, but the custom to treat inland bills and notes in the same manner as foreign bills has become so well-nigh universal that, in common parlance, the term means the taking of such steps as are required to charge the indorser. For the same reason, the word "protested," sometimes employed in giving notice of dishonor to indorsers of inland bills and notes, clearly implies demand, non-payment, and consequent dishonor of the bill or note in all cases where protest is necessary. 1 Pars. Bills and Notes, 471, 575, 579, 582, and authorities there cited.

It is not essential that the waiver should be in writing. When the fact is established by competent evidence, a parol waiver is as valid and binding as a written one. The only difference is in the character of the proof. *Barclay v. Weaver*, 7 Harris, 396. It was there held that a verbal agreement between the holder and indorser to renew a note at maturity, might be shown by oral testimony, and that demand and notice were thereby dispensed with. The general principle underlying nearly all cases of waiver is that the indorser has by word or deed done something calculated to mislead the holder and induce him to forego the usual steps to fix the liability of the former.

It is unnecessary to refer specially to several well-considered cases in other States, holding that a waiver of protest, without more, dispenses with demand and notice of non-payment. They are in full accord with our own cases on the subject, the last of which is *Hucken-*

¹ N. I. L. § 128.

stein v. Herman, 34 Leg. Int. 232. That was a suit by the holder against the indorser of a note which was not presented for payment at maturity. To sustain the averment of demand and notice of non-payment, the plaintiff relied on the words "protest waived," written on the note and signed by the indorser the day before, or early in the morning of the day the note matured. The court charged in substance that the words were equivalent to an express waiver of demand and notice, and on that point there was a verdict for the plaintiff. In the *per curiam* opinion of this court, affirming the judgment of the Common Pleas, it is said: "A waiver of protest before maturity of a note is a waiver of all the steps leading to it, and includes demand and notice of non-payment. This, we think, is the general understanding of a waiver of protest among business men. The very purpose of a waiver is to supersede the ordinary steps and avoid trouble and expense. To waive the mere act of the notary, and yet suffer the duty of making demand and giving notice of its result to remain, would scarcely be thought of by business men." It is argued by the learned counsel of defendant that this conflicts with the former ruling of this court in Scott v. Greer, 10 Barr, 103, but we do not so understand it. In that case it was held that the waiver of protest by an indorser on the day the note matured puts him in the same situation as if the protest had been made and proved; and, there being no contradictory evidence, it is proof under the Act of Assembly of demand, refusal and notice. It is true the learned judge who delivered the opinion in that case intimates that the *prima facie* case thus presented by the plaintiff might have been rebutted by showing that no demand was, in fact, made; but what was said on that subject was aside from the question before the court, and, in so far as his remarks may be considered in conflict with the ruling in Huckenstein v. Herman, *supra*, they cannot be regarded as authority for the position that a waiver of protest does not necessarily imply a waiver of demand and notice. The principle decided in Huckenstein v. Herman is akin to that involved in Ridgway & Budd v. Day, 1 Harris, 208, and Brittain v. The Doylestown Bank, 5 W. & S. 87. In the latter case the indorser, by memorandum on the note, waived "notice of non-payment by the maker," and it was held that proof of demand was thereby rendered unnecessary. "The interpretation," said Gibson, C. J., "is that he agreed to become immediately liable, without more, in case the note should not be taken up at maturity."

In the case at bar it is conceded there was neither demand nor notice of non-payment, nor was there any written waiver of protest. For the purpose of sustaining the material averment of demand and notice, testimony was introduced by plaintiff tending to prove, in substance, that during a course of dealing with the bank, defendant had several notes discounted, and the proceeds placed to his credit; that when he first requested a discount, he informed the officers of

the bank that, desiring to deal with them, he would be obliged to apply for discounts, and wished it to be understood that none of his notes should be protested; that, pursuant to this request, none of them were protested, nor was payment of them demanded of the maker; and, in consequence of that understanding, payment of the note in suit was not legally demanded, nor was notice of non-payment given to defendant. In view of this testimony the court was requested to charge:

"1st. If an indorser gives directions to the indorsee, at the time or before he brings the note for discount, that the same shall not be protested, and this is assented to by the indorsee, it relieves the latter from the duty of making demand for payment of the maker, and of giving notice of the non-payment to the indorser of such note."

"2d. If the defendant waived protest of the note before maturity, no demand of the maker was necessary to charge him with its payment."

The learned judge refused these points, saying: "Such waiver of protest is *prima facie* evidence of presentment to and demand upon the maker, but it does not relieve the indorsee from the necessity of such presentment and demand;" and he further instructed the jury, in substance, that if, in point of fact, no demand was made or no notice given to defendant, the plaintiff could not recover. It being conceded that there was no legal demand or notice, the verdict, as matter of course, was for defendant. The plaintiff's testimony, if believed by the jury, was clearly sufficient to have warranted them in finding the facts as stated in the foregoing points, and, for reasons already suggested, they should have been affirmed.

When the alleged waiver is in writing, its construction is for the court, but when it consists of verbal communications, it is the special province of the jury to consider the testimony and ascertain the facts. When ascertained, it is their duty to apply the law under the direction of the court. Assuming the facts to be as recited in the points, the law as therein stated is correct, and hence there was error in refusing to affirm plaintiff's first and second points, and in charging the jury as complained of in the third specification.

Judgment reversed, and a venire facias de novo awarded.

SIGERSON *v.* MATHEWS.

Supreme Court of the United States, December, 1857. 20 How. 496.

And the waiver may be before or after maturity, express or implied; e. g. a promise to pay, by an indorser, made before, or, with full knowledge of the facts, after maturity is a waiver of steps.

THE case is stated in the opinion of the court.

[Argument not reported.]

MCLEAN, J. This is a writ of error to the Circuit Court for the District of Missouri.

An action was brought by Mathews against John Sigerson, as indorser on a note of James Sigerson, now deceased, dated the 10th of March, 1852, for the payment of the sum of \$2000, two years after date, at the Bank of the State of Missouri, with interest from the date.

It was proved on the trial that in 1851 Mathews advanced largely to John Sigerson on some transactions in pork, whereby Sigerson became indebted to him in the sum of \$2000; that Sigerson wanted two years' time, on which Mathews required a mortgage on real estate as security; but Sigerson offered to give the note of his brother James, indorsed by himself, instead of the mortgage; and he represented that his brother James was the owner of a valuable real estate near St. Louis; which offer was accepted, and the note was given.

Some time in the fall of 1852, Joseph E. Elder, a witness, received the note from Mathews for collection, soon after the death of James Sigerson, and before the note became due. Witness called on John Sigerson, and asked him if he should have the note protested against the estate of James Sigerson. He replied, that the witness need not do so, and that the notes should be paid at maturity. The witness then placed the note in his portfolio, where it remained until after due. After it was due, witness called on John Sigerson, and informed him that he had neglected to put the note in bank for collection, and asked him what he was going to do. He said he would see witness in a few days, and arrange it. Afterwards Sigerson said to the witness that he did not consider himself liable as indorser, as the note had not been protested.

In February, 1852, John Sigerson sold his interest in the farm near St. Louis, which was one half of it, and which contained about one thousand acres, to James Sigerson, who was to pay off the incumbrances on the land, which amounted to about \$16,000. James executed twenty notes for \$2000 each, payable in six, twelve, and eighteen months; and John Sigerson made him a deed. In July, 1852, James reconveyed the land to John, and the bargain was rescinded.

This was done because James had not fulfilled his contract. Nineteen of the notes were given up, but the note now in suit was not surrendered, and for which the account of James was credited on the books of John. James, on his decease, left no property.

On the above facts, the court charged the jury, "if they believe from the evidence, that, before the maturity of the note, in conversation with the agent of the plaintiff, the defendant dispensed with a presentation of the note and demand of payment, and promised to pay it or provide for its payment at maturity, he cannot now set up as a defence to this suit, that the note was not presented for payment, and demand made therefor, when it was due, and that no notice of its dishonor was given;" that, "if, after the maturity of the note, the defendant promised the plaintiff or his agent to pay the same, having at the time of making said promise knowledge of the fact that the note had not been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the defendant cannot now set up, as a defence to said note, a want of such demand or notice." "If the defendant dispensed neither with the presentation of the note and notice, nor promised to pay the same, having knowledge as above stated, the plaintiff cannot recover."

Exception was taken to these instructions. Certain instructions were asked by the defendant, which were refused; but it is unnecessary to state them, as they are substantially embraced in those given by the court.

As there was no formal demand of payment, nor protest for non-payment and notice, those requisites must have been waived by the defendant, to make him responsible as indorser; and to this effect were the instructions of the court; and we think the testimony not only authorized the instructions given, but also the verdict rendered by the jury. Before the note was due, the defendant said to Elder, the agent of Mathews, and who held the note, that he need not take steps to collect it from the estate of his brother James, as it should be paid at maturity. This was an assurance which could not be mistaken, and it was relied on by the agent. He placed the note in his portfolio, where it remained until after it became due. After this, the agent called on the defendant, and informed him that he had neglected to take measures for the collection of the note, and asked him what he was going to do. He answered, that in a few days he would see the witness, and arrange it. This was an unconditional promise to pay the note, which no one could misunderstand, and which he could not repudiate at any subsequent period.

A promise by an indorser to pay a note or bill dispenses with the necessity of proving a demand on the maker or drawer, or notice to himself. *Pierson v. Hooker*, 3 Johns. 68; *Hopkins v. Liswell*, 12 Mass. 52. Where the drawer of a protested bill, on being applied to for payment on behalf of the holder, acknowledged the debt to be

due, and promised to pay it, saying nothing about notice, it was held that the holder was not bound to prove notice on the trial. *Walker v. Lavery*, 6 Munf. 487. An unconditional promise by the indorser of a bill to pay it, or an acknowledgment of his liability, and knowledge of his discharge by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawee, acceptor, or maker. *Thornton v. Wynn*, 12 Wheat. 183; *Bank of Georgetown v. Magruder*, 7 Peters, 287. We think the instructions of the court were correct, and that consequently the judgment must be

Affirmed, with costs.

ARNOLD v. DRESSER.

Supreme Court of Massachusetts, September, 1864. 8 Allen, 435.

But a promise to pay in ignorance of the fact that no steps have been taken will not amount to a waiver.

CONTRACT against the indorser of a joint promissory note.

At the trial in the Superior Court, before MORTON, J., it appeared that on the day when the note became due, Theodore S. Stratton, in behalf of the plaintiff, demanded payment thereof of the two promisors, but did not have the note in his possession at the time; and the note was not paid. The plaintiff testified that on the same day he called upon the defendant, and gave notice to him that demand had been made on the makers; that one of the makers called during the interview, and both he and the defendant said that the note should be paid soon.

Upon this evidence, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendant, which was accordingly rendered, and the plaintiff alleged exceptions.

[Argument not reported.]

BIGELOW, C. J. The defendant is not liable as indorser of the note declared on. In order to charge him it was necessary for the plaintiff to show due presentment and demand of the note on both the promisors; *Union Bank of Weymouth, &c. v. Willis*, 8 Met. 504;¹ or a waiver thereof by the defendant. There were no such presentment and demand. If a note is made payable at a particular place, the holder must have it at that place on the day of its maturity, in order to make due presentment; if it is not payable at a designated place, the note must be presented to the promisor at his usual place of business or at his dwelling-house. But no valid presentment and demand can be made by any person without having the note in his

¹ *Ante*, p. 38.

possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence. *Shaw v. Reed*, 12 Pick. 132; *Freeman v. Boynton*, 7 Mass. 483.¹

Nor was there any waiver of due demand by the defendant. No such waiver is made, where an indorser promises to pay the note in ignorance of the fact that he has been discharged by the laches of the holder, in not making due demand of the promisor, or where such promise is made under a misapprehension or mistake of facts concerning the due presentment and demand of the note. *Low v. Howard*, 11 Cush. 268; *Kelley v. Brown*, 5 Gray, 108. In the case at bar, the defendant made the statement on which the plaintiff relies to show a waiver, not only in ignorance of the fact that the note had not been duly demanded of one of the promisors, but under a mistaken belief that it had been so demanded, induced by the false statement to that effect made to him by the plaintiff.

Exceptions overruled.

NOTE. — Although the indorser must know the facts that steps have not been taken, to render a waiver available against him, he need not know the legal effect of the facts, that is, that he is discharged. *Glidden v. Chamberlain*, 167 Mass. 468, 495; *Givens v. Merchants' Bank*, 85 Ill. 442.

¹ *Ante*, p. 211.

CHAPTER IX.

ACCOMMODATOR'S CONTRACT.

[An accommodation party is one who lends to another the credit of his name on a negotiable instrument, which is to be negotiated for value.¹]

THATCHER v. THE WEST RIVER NATIONAL BANK.

Supreme Court of Michigan, October, 1869. 19 Mich. 196.

One who becomes a party to a negotiable instrument for the accommodation of another, is liable thereon to a *bona fide* purchaser, according to his contract as it appears on the face of the instrument, though the purchaser had notice of the accommodation.²

ASSUMPSIT by the indorsee of a promissory note against the maker. Verdict for the plaintiff, and the defendant brought writ of error. The facts appear sufficiently in the opinion.

[Argument not reported.]

CHRISTIANCY, J. . . . [A question of evidence to prove the corporate existence of the plaintiff below, the defendant in error.]

The defence relied upon by the defendant below, without going here into unnecessary particulars, was substantially, that the note was given to L. N. Sprague, agent of the Jamaica Leather Company (to whose order it was made payable), without consideration, and merely for the accommodation of said Leather Company, upon the assurance of Sprague that the note would be taken care of and the defendant protected; and that the bank, the indorsee and plaintiff below, received it with full notice of these facts.

The testimony of the defendant himself, and perhaps some other testimony in the cause, tended to show, that the note was given for the purpose above stated, and without consideration, and with the assurance of Sprague above stated.

But the defendant's own testimony further tended to show that the note was given for the express purpose, and with the full understanding that it was to be negotiated to the bank to enable the Leather Company to raise money upon it. It was also clearly shown by other

¹ Bigelow, Bills and Notes, 184; N. I. L. § 46.

² N. I. L. § 46.

evidence that the bank did discount the note indorsed in blank by Sprague, as agent, and paid the money for it; and there was no evidence of a contrary tendency.

We think it, therefore, wholly immaterial whether the bank had notice, or not, of the circumstances under which, and the purpose for which it was given, and of the other facts relied upon in the defence. Had the directors of the bank, knowing the nature of the previous transactions between defendant and the Leather Company, been present and heard and known the whole arrangement between Sprague and the defendant, when the note was given, the bank would still be entitled to recover. See *Charles v. Marsden*, 1 Taunt. 224; *Smith v. Knox*, 3 Esp. 46; *Thompson v. Shepherd*, 12 Met. 311; *Brown v. Mott*, 7 Johns. 361; *Lord v. Ocean Bank*, 20 Penn. St. 384; *Grant v. Ellicott*, 7 Wend. 227; *Renwick v. Williams*, 2 Md. 356; *Molson v. Hawley*, 1 Blatch. 409; *Caruthers v. West*, 11 Q. B. 143.

The want of consideration, and the assurance of Sprague that the note would be taken care of, do not affect the right of the bank as indorsee, though taking it with notice. Mere accommodation paper is generally, at least, without consideration, and such assurances, express or implied, are always given or relied upon, when such accommodation paper is given. Such facts might constitute a good defence as against the party for whose accommodation it is given;¹ but to allow them to defeat a recovery by an indorsee who advances money upon it — when that is the purpose for which it is given — would defeat the very purpose for which such paper is made, and render the transaction absurd.

As between the defendant and the indorsee, the defendant took the risk of Sprague's assurances being made good, and his remedy is upon him or the party he represented.

These conclusions render it unnecessary to notice the defendant's requests to charge with reference to the want of consideration, and the question of notice, or the charges given upon these points.

A copy of the note with the indorsement accompanied the declaration, and the note and indorsement were read in evidence without objection, and no evidence was given to disprove the indorsement. The court was therefore right in refusing to charge that it was necessary to prove the indorsement in any other way.

We see no error in the record, and the judgment must be

Affirmed with costs.

¹ That is, in a suit by him against the party who had signed for his accommodation.

GRANT v. ELLICOTT.

Supreme Court of New York, May, 1831. 7 Wend. 227.

Or actual knowledge of it.

ASSUMPSIT by indorsee against the acceptor of a bill of exchange. Plea, that the bill was accepted for accommodation of the drawer and that the plaintiff took it with knowledge of the fact. Demurrer to the plea.

[Argument not reported.]

SAVAGE, C. J. The defendant says he ought not to pay the bill, because no consideration passed between him and Graham, and this was known to the plaintiffs; that is, the defendant accepted the bill for the accommodation of the drawer, which the plaintiffs knew. This is no defence; it was so decided in *Smith v. Knox*, 3 Esp. 46. Lord Eldon there held that, where a bill is given for the accommodation of the drawer or payee, and is sent into the world, it is no answer to an action upon it against the acceptor, that he accepted it for the accommodation of the drawer and that the fact was known to the holder. In such case, the holder, if he gave a *bona fide* consideration for it, is entitled to recover, though he had full knowledge of the transaction. In that case, the plaintiff produced no proof but of handwriting of the parties to the bill.

The case of *Charles v. Marsden*, 1 Taunt. 224, was very like this case. The action was brought by the indorsee against the acceptor. The defendant pleaded that it was accepted for the accommodation of the drawer, and without any consideration, and that this was known to the plaintiffs when they took the bill, after it was due. Mansfield, C. J., says: "There is no allegation of fraud in this plea, nor any allegation that the plaintiff did not give a valuable consideration for this bill; it must, therefore, be presumed that he did." Lawrence, Justice, says: "In the present case, it is to be supposed that the party (drawer) persuades a friend to accept a bill from him, because he cannot lend him money; would there be any objection, if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing it after it is due?"¹ For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it."

I know of no decision supporting this plea, and it would be extremely prejudicial to commercial paper if it could be supported. The acceptor in a bill is considered in the same light as an indorser

¹ See *Chester v. Dorr*, 41 N. Y. 279, *post*, p. 322.

of a promissory note; and it is well known that much of the paper discounted in our banks is accommodation paper, and it never has been supposed that the indorser in such case is not liable.

Judgment for plaintiffs on demurrer, with leave to amend, on payment of costs.

SMALL v. SMITH.

Supreme Court of New York, October, 1845. 1 Denio, 583.

But he is not liable to a holder who had notice at the time of purchase, that the instrument was negotiated in violation of the terms upon which the accommodation was given.

ASSUMPSIT upon a negotiable note, signed by the defendant as surety for accommodation of the maker. Defence, fraudulent diversion, and that the plaintiff took the note with knowledge. Verdict for the plaintiff, upon instructions to the jury to which the defendant excepted. Motion for a new trial, for misdirection. The facts are detailed in the opinion.

[Argument not reported.]

BEARDSLEY, J. If the evidence given on the trial was true, and that was for the jury to determine, it is perfectly clear that the note was delivered to the plaintiffs in violation of the agreement upon which it had been indorsed by the defendant. The plaintiffs, therefore, were not entitled to recover, unless they received it *bona fide* and upon a valuable consideration. Both were necessary. It must have been received in good faith, without notice of the arrangement on which the indorsement had been made, and the transfer must have been upon what the law regards as a valuable consideration. These principles admit of no dispute; and although, upon some points of commercial law in close proximity to those I have stated, discordant opinions may be found, *Stalker v. McDonald*, 6 Hill, 93; *Swift v. Tyson*, 16 Peters, 1, there is entire harmony as to those I have mentioned.

The judge charged that, if the plaintiffs received the note in payment and satisfaction of a debt due to them from Hulburt, the maker of the note, that was a sufficient consideration for its transfer, and they thereby became purchasers for value. This, as a legal proposition, is not questioned; but the bill of exceptions fails to show any evidence to which this principle could be applied. There was no proof which tended to show that the note had been transferred in extinguishment of the debt of Hulburt. The judge, therefore, in my view of the case, erred in submitting that question to the jury.

But I shall not dwell on this point, for the case may be disposed of on the question of good faith.

It appears by the testimony of Hulburt that he was indebted to the plaintiffs in a sum exceeding the amount of this note, and that Small, one of the plaintiffs, came to Vienna, where Hulburt resided, to secure payment of said debt. Small proposed to Hulburt to give a note at one year with security, and the defendant, who lived in another county, was spoken of for that purpose. Small said he would take the defendant as surety, and it was arranged that, while Small was absent (as he was going West for a few days), Hulburt should go to the defendant's residence in order to obtain him as such surety. Pursuant to this arrangement, Hulburt went to see the defendant, and told him what he wanted. At first the defendant refused to indorse; but it was finally agreed between them that he would indorse the note upon condition that one Austin, who then held a note given by the defendant, should deposit the same with a third person, there to remain until the defendant should be discharged from said indorsement. The note in question was accordingly signed by Hulburt and indorsed by the defendant; but it was not to be transferred to Small, or used in any manner, until the one held by Austin had been deposited under said arrangement. Hulburt returned with the note to Vienna, where Austin lived, and told him of the arrangement under which the indorsement had been made. Austin declined to comply with that arrangement; but Hulburt, as he states, left the note in suit on Austin's table, and did not see it again until Small had returned to Vienna. Hulburt first saw Small after his return at Austin's office, where, on arriving at the office, according to the testimony of Hulburt, Small said to him, "We have fixed that matter, and Mr. Austin has let me have the note." The witness then inquired of Austin, in Small's presence, in what manner the note had been turned out, and whether the arrangement of the defendant had been complied with, to which Austin made no answer; but Small said he had prevailed on Mr. Austin to indorse the note, and he had got it. This, according to the witness (Hulburt), was all which passed at that time. Another witness (Paul), who was present, said the remark of Hulburt to Austin was that he supposed he had not turned out the note without complying with the request of Mr. Smith, the defendant, to which Austin made no answer; but Small said he had prevailed on Mr. Austin to indorse the note, and had released Mr. Smith.

It is not material which of these witnesses was correct as to the form of the remarks made at the time. Both come to the same result; for what was said, according to the statement of either witness, was full notice to Small that the indorsement had been procured upon some arrangement or condition which had not been complied with. Here, then, Small had actual notice that the indorsement was condi-

tional; and, if the note was subsequently transferred to him, he would necessarily take it subject to that condition. When this notice was given, the note was in Small's hands. He had received it, as he said, of Mr. Austin. But it cannot be pretended he had received it of Austin upon any consideration moving between them. Indeed, the first remark of Small to Hulburt, and all that was said on that occasion, goes to show that whatever might have been done by Austin had been done for Hulburt, and not for himself, and in furtherance of the negotiation which had been commenced between Hulburt and Small. It is not shown that Austin had authority from Hulburt to transfer this note to Small on any terms, although it may be inferred that he was authorized to do so, on complying with the condition upon which the defendant's indorsement had been made. Small did not set up that he had received the note as the property of Austin, and the whole transaction shows he did not. He could not, therefore, upon the facts as disclosed by the witnesses, pretend that he had acquired title to the note in any manner before he was apprised by Hulburt that the indorsement was made on a condition which had not been performed. It is more a matter of inference than of anything like direct proof, that Hulburt at any time assented to the transfer of the note to Small; but if he did so, after notice to Small of the condition on which the indorsement had been made, it is plain that the plaintiffs ought not to recover, as the condition has never been performed. If the plaintiffs claim as purchasers of the note from Austin, they are met by two objections: first, Small, one of the plaintiffs, was aware that the note belonged to Hulburt, and not to Austin; and, secondly, it is not shown that the plaintiffs paid or advanced anything to Austin, or that any consideration passed between them for the transfer of the note. And as to Hulburt, if he assented to the transfer of the note to Small, it was after explicit notice that the indorsement was conditional, as is proved by the testimony of both Paul and Hulburt. Had the case been put to the jury upon the point of notice, with suitable explanations, there is no doubt what the verdict should and would have been, unless these witnesses were wholly discredited. I think the case was not so submitted to the jury, and that it should be sent back for a new trial.

New trial granted.

NOTE. — As to what constitutes a fraudulent diversion of the instrument, see *Mohawk Bank v. Corey*, 1 Hill, 518; *Duncan v. Gilbert*, 5 Dutch. 521.

CHESTER *v.* DORR.

Court of Appeals of New York, December, 1869. 41 N. Y. 279.

Nor to a holder who purchased after the maturity of the instrument, that is, after the expiration of the time during which the accommodation was to run.

ACTION by the holder (begun against an indorser, but now continued) against the executors of an indorser of several negotiable promissory notes. The defendant's testator had indorsed the notes at the request and for the accommodation, without value, of one Myers, who held them at maturity. Holding the notes, unpaid, for two or three years after they became due, Myers now transferred them for full value to the plaintiff's assignor. Verdict, under direction, for defendant; appeal; report of referee in favor of plaintiff, affirmed on appeal by the General Term, Superior Court of New York. Appeal.

[Argument not reported.]

WOODRUFF, J. Mr. Justice Story, in his Treatise on Promissory Notes, § 178, thus states the difference between the legal effect of a promissory note before and after maturity: "If the transfer is made before the maturity of the note to a *bona fide* holder for a valuable consideration, he will take it free of all equities between the antecedent parties of which he had notice. If the transfer is after the maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice thereof or not.¹ But . . . it is not to be understood by this expression that all sorts of equities existing between the parties, from other independent transactions between them, are intended; but only such equities as attach to the particular note, and as between those parties, would be available to control, qualify, or extinguish any rights arising thereon."

The learned author gives this as the final conclusion from the numerous cases cited by him, an examination of which shows that it is only after some difference of opinion that it has come to be deemed settled. Or, as Mr. Chitty says, of the opinion of Buller and Ashurst, JJ., in *Brown v. Davis*, 3 T. R. 80, expressed when Lord Kenyon doubted its broad extent, "this latter opinion is now the law." That opinion was to the effect "that where a note is overdue, that alone is such a suspicious circumstance as makes it incumbent on

¹ This form of expression would hardly be used at the present day. "Notice" here is used in the sense of knowledge. Taking after maturity is now considered taking with notice,—notice absolute of equities if any exist. Bigelow, *Bills and Notes*, 233, 234.

the party receiving it to satisfy himself that it is a good one, otherwise much mischief might arise." "If a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. . . . Generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him."

The foundation of the rule which distinguished commercial paper from ordinary commercial-law *choses in action* is in harmony with the law thus stated. The holder of the former is protected against any inquiry into its previous history, and is warranted in giving it full faith, according to its tenor, because commercial convenience and the importance of the free and unembarrassed use of commercial credits require it; and on this the mercantile customs, which ripened into the law merchant, were founded. These reasons, however, could have no application to paper which had been dishonored. The credit it was adapted to invite is spent, and the very fact of dishonor is inconsistent with the purposes which the rule was intended to subserve.

The rule is simple and convenient of application, is in no sense inconsistent with the usefulness of negotiable paper for the purposes for which it is intended, and, as it seems to me, is a just security against mischief and fraud. In the terms in which it is above stated it includes the defence of want of consideration, whenever that renders the note invalid in the hands of him who holds it when it becomes due. Such want of consideration is an inherent defect in the contract itself; or, in the language of the rule, attaches to the note itself, in the hands of one for whose accommodation a note is made, and does not, like a set-off or other collateral matter apart from the note, arise out of an independent transaction.

But the same learned writer above referred to states that the mere fact that an accommodation note has been indorsed after it became due, does not of itself, without some other equity in the maker, defeat a recovery by the indorsee. Story, § 194. And Mr. Chitty states that it has been so decided. The cases of *Charles v. Marsden*, 1 Taunt. 224, *Sturtevant v. Ford*, 4 Man. & G. 101, 4 Scott, 608, and *Caruthers v. West*, 11 Q. B. 143, are in support of the proposition. These are the cases upon the authority of which the present case was decided below.

I am constrained to say that I am not satisfied that such an exception to the rule is either just or called for by any principle, nor am I at all convinced by the reasons assigned for the exception.

That the maker or indorser of a note for the accommodation of another should be held to the terms of his own indorsement, according to their just interpretation, I fully agree. That one who receives

such paper before maturity should not be affected by the mere fact that it was made or indorsed without consideration I equally agree. That when a party lends his note or indorsement to another without restriction as to its use he authorizes the negotiation thereof, in any manner which may serve the convenience or credit of the borrower, may be conceded.

From this latter concession it is argued that such a lending of one's name is furnishing a continuing guaranty of the payment of the note, irrespective of its terms as to time of payment, and is therefore binding whenever it is transferred and however long after it has become payable and been dishonored. That the absence of express restriction warrants the inference that the making or indorsement was to enable the borrower to use it whenever thereafter it suited his pleasure, and so "enforcing its payment is in accordance with the object for which the note was, as matter of accommodation, made or indorsed;" and in the discussion in England it has been suggested that, supposing an accommodation acceptance to remain in the hands of the party accommodated, it may be treated as giving authority by implication to use it thereafter as his convenience or needs may require.

In respect to the last suggestion two observations are pertinent; first, it begs the question, for assuming the rule to be that he who receives a note or bill after dishonor acquires no better title to recover thereon than he has from whom it was received, then there is no reason why the accommodation maker or indorser should not treat the note in the hands of the borrower, after maturity, as *functus officio*, and mere waste paper. And second, how is the maker or indorser in such case to withdraw his note or indorsement? Is he to be driven into a court of equity, and to praying out an injunction, to prevent a subsequent transfer? I think not. Take the present case; the note itself was the property of the holder at its maturity (Myers), and was a valid note in his favor against the maker. The indorsement of the defendant (the appellant's testator) was material as a transfer of title, although, being made for Myers's accommodation, it could not be enforced against such defendant as indorser. I cannot agree that it was incumbent on the defendant to go into a Court of Chancery to compel Myers to suffer a writing of the words "without recourse" or an equivalent expression as a qualification of such indorsement.

As to the other reason, it is even less satisfactory, because it proceeds, I think, upon an entire misconstruction of the act of making or indorsing a note for the accommodation of another. Its purpose and object is to obtain credit for such other, or to enable him to do so. The very terms of the note declare the credit it is intended to procure, that is to say, until the maturity of the note. Within that range the making or indorsement being unrestricted as to its use, the

borrower may use it as his exigencies require, and a transferee may receive it in reliance upon the undertaking which is imported by its terms.

But the very term of payment contained in the note imports that the accommodation party undertakes that the note shall be paid at its *maturity*, and that he who then holds the note shall have recourse to him, if it be not *then* paid. Where the accommodation (as in the present case) is by indorsement, that is the precise contract, viz., that the note shall be paid at maturity, and not that it shall be paid at any future time. If the note be not paid at maturity, the contract is broken, and if he who then holds it can recover thereon, then his right of recovery may be transferred to another; and the recovery of the latter will be, not because the accommodation indorser undertook that the note should be paid to him, or should be paid at some date after it was due, but because a valid cause of action, existing in favor of the holder at maturity, has been transferred to him.

It is not according to the intent or meaning of an indorsement for another's accommodation to say that the indorser intends to give the use of his credit for any other period than that limited in the note, or that such an indorsement imparts authority to use it when that period has elapsed.

One may be willing by indorsement to guaranty the solvency of another for sixty days, or for six months, and yet he would wholly refuse to do so for a period of two years. And accordingly, when such accommodation is given, it is a most material circumstance that the time during which the borrower is at liberty to obtain credit on the note is fixed by the limitation of the time of payment therein.

I deem the just view of the subject to be that, when a note has become due and is dishonored, the rights and responsibilities of the parties thereto are fixed. The note then loses the chief attribute of commercial paper. It is no longer adapted to the uses and purposes for which such paper is made, and in respect of which it is important that it should circulate freely. And thereafter he who takes it takes it with knowledge of its dishonor, with obvious reason to believe that there exists some reason why it was not paid to the holder; and takes it with just such right to enforce it as such holder himself has, and no other.

In thus stating my views I am not insensible of the apparent authority for the decision made below; but I am also aware that the judges in England have not been at all agreed on the subject, and have expressed doubt of the correctness of the decision in *Charles v. Marsden*, upon which the other two cases above referred to were decided. The cases, largely collected in the notes to *Chitty* in the recent edition, warrant, I think, the dissatisfaction I have expressed.

No case in this State has called for a decision of the question;

and yet in *Brown v. Mott*, 7 Johns. 361, and in *Grant v. Ellicott*, 7 Wend. 227, the case of *Charles v. Marsden* is referred to without disapprobation, and the proposition derived therefrom is stated; but in neither was the point now raised before the court, for in neither did it appear that the plaintiff took the note after it became due. And that in other States in this country such an exception to the general rule first above stated is repudiated, see *Brown v. Hastings*, 36 Penn. St. 285; *Britton v. Bishop*, 11 Vt. 70; *Odiorne v. Howard*, 10 N. H. 343; *Cummings v. Little*, 45 Maine, 183;¹ *Vinton v. King*, 4 Allen, 563;² *Kellogg v. Barton*, 12 Allen, 527. And the general proposition that he who takes a note when overdue takes it subject to all defences inherent in the note, or arising out of any agreement with the holder, expressed or implied, and relating thereto, or, in another form, that such an indorsee obtains no greater or other rights than his indorser had in it at the time of the indorsement, has been stated as law in cases almost without number.

It will perhaps suffice to refer to two from the Supreme Court of the United States. *Andrews v. Pond*, 13 Pet. 79, says of the indorsee of a dishonored bill: "If he chooses to receive it, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." *Fowler v. Brantley*, 14 Pet. 321 [says]: "A note overdue or bill dishonored is a circumstance of suspicion to put those dealing for it afterward on their guard, and in whose hands it is open to the same defences as it was in the hands of the holder when it fell due. After maturity such paper cannot be negotiable in the due course of trade, although still assignable." See also *Foley v. Smith*, 6 Wall. 492.

In my opinion the just rule, and the rule resting on the soundest principle, requires us to reverse. The supposed exception to the general rule rests on neither reason nor, as I think, on authority, certainly not in this country.

Five other judges for reversal; two judges dissented.

Judgment reversed.

NOTE. — There are many authorities contrary to the doctrine of the principal case, and holding that, where the instrument is negotiated when overdue, the accommodation party will be liable according to his contract, unless he is discharged for want of notice of dishonor, in case he is a drawer or indorser, or unless the instrument has been fraudulently diverted from the purpose for which the accommodation was given; and the only effect given to the fact that the paper was overdue when transferred, is to fix the holder with notice of such fraudulent use, if any. *Dunn v. Weston*, 71 Me. 270; *Daniel on Neg. Insts.* § 786 and note (74). These authorities deny that the accommodation

¹ But see *Dunn v. Weston*, 71 Me. 270, *infra*, note.

² *Ante*, p. 239.

party has limited the period of accommodation to that before the maturity of the paper, unless he has done so by agreement with the accommodated party, in which case he may defend against the purchaser after maturity. *Dunn v. Weston*, 71 Me. 270, 274, and cases cited.

Massachusetts and Pennsylvania follow the doctrine of *Chester v. Dorr*, *supra*; *Peale v. Addicks*, 174 Pa. St. 549; *Kellogg v. Barton*, 12 Allen, 527.

CHAPTER X.

ASSURER'S CONTRACT.

MOSES v. LAWRENCE COUNTY BANK.

Supreme Court of the United States, October, 1892. 149 U. S. 298.

Guaranty of the payment of a promissory note made thereon on a day subsequent to the delivery of the note, requires a distinct consideration, and in Alabama a distinct expression of the same in writing.¹ *Aliter* if note and guaranty are contemporaneous.

ACTION upon a guaranty of a negotiable promissory note made by and payable to the order of Sheffield Furnace Company; the guaranty being in the following words written upon the note and signed: "We hereby guaranty the payment of the note at maturity." It was alleged in the complaint that the guaranty was made for valuable consideration; that the note with the guaranty thereon was indorsed by the payee, for value, to the order of J. P. Witherow, before maturity, and before maturity indorsed and transferred for value by Witherow to the plaintiff; and that the defendants waived protest and notice.

The note was made and was payable in Alabama, a statute of which provides that a special agreement to answer for the debt of another is void "unless such agreement or some note or memorandum thereof, expressing the consideration," is in writing. The defendant pleaded, *inter alia*:

Fourth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration for the promise.

Fifth. That the note was given by the Sheffield Furnace Company for a debt owing to Witherow before it was made, and was not founded upon a consideration paid or liability accrued at the time of the making thereof, and the guaranty was without any consideration.

Eighth. That the Sheffield Furnace Company paid the debt sued on to Witherow before this action was commenced.

Twelfth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration

¹ In many States, no statement of the consideration is required by the Statute of Frauds. See Rev. Laws of Mass. ch. 74, § 2.

therefor, and was not executed contemporaneously with, nor before the negotiation of, the note of which it guarantied the payment.

The plaintiff demurred to the fourth and fifth pleas, because they did not deny that the defendants indorsed the guaranty upon the note contemporaneously with its execution and before any negotiation thereof; and also demurred to these pleas, as well as to the twelfth plea, because they did not deny that the defendants indorsed the guaranty upon the note before its negotiation to the plaintiff, and in order to give it credit and currency, nor allege that the plaintiff had notice of any want of consideration for the guaranty.

To the eighth plea a replication was filed, alleging that the plaintiff became the owner of the note for a valuable consideration before maturity, and that no part thereof had ever been paid to the plaintiff or to any one authorized by the plaintiff to receive it. To this replication the defendant demurred.

The court below sustained the demurrers to the pleas, and overruled the demurrer to the replication.

Issue was then joined on the eighth plea and the replication thereto; and a trial by jury was had upon that issue, at which the plaintiff gave in evidence the note with the indorsements and the guaranty thereon.

Verdict for the plaintiff, by direction of the court. Exceptions and writ of error taken.

[Argument reported.]

GRAY, J. By the Statute of Frauds of Alabama a special promise to answer for the debt, default, or miscarriage of another is void "unless such agreement, or some note or memorandum thereof, expressing the consideration" is in writing and subscribed by or in behalf of the party to be charged. Alabama Code of 1887, § 1732. The words "value received," or acknowledging the receipt of one dollar, sufficiently express a consideration. *Neal v. Smith*, 5 Ala. 568; *Bolling v. Munchus*, 65 Ala. 558.

Every negotiable promissory note, even if not purporting to be "for value received," imports a consideration. *Mandeville v. Welch*, 5 Wheat. 277; *Page v. Bank of Alexandria*, 7 Wheat. 35; *Townsend v. Derby*, 3 Met. 363. And the indorsement of such a note is itself *prima facie* evidence of having been made for value. *Riddle v. Mandeville*, 5 Cranch, 322, 332.

The promissory note in the case at bar, having been made payable to the maker's own order, first took effect as a contract upon its indorsement and delivery by the maker, the Sheffield Furnace Company, to Witherow, the first taker. *Lea v. Branch Bank*, 8 Porter, 119; *Little v. Rogers*, 1 Met. 108; *Hooper v. Williams*, 2 Exch. 13; *Brown v. DeWinton*, 6 C. B. 336.

A guaranty of the payment of a negotiable promissory note, written by a third person upon the note before its delivery, requires no other consideration to support it, and need express none other (even where the law requires the consideration of the guaranty to be expressed in writing), than the consideration which the note upon its face implies to have passed between the original parties. *Leonard v. Vredenburg*, 8 Johns. 29; *DeWolf v. Rabaud*, 1 Pet. 476, 501, 502; *Nelson v. Boynton*, 3 Met. 396, 400, 401; *Bickford v. Gibbs*, 8 Cush. 154; *Nabb v. Koontz*, 17 Md. 283; *Parkhurst v. Vail*, 73 Ill. 343.

The demurrers to the fourth and fifth pleas therefore were rightly sustained.

But a guaranty written upon a promissory note after the note has been delivered and taken effect as a contract requires a distinct consideration to support it; and if such a guaranty does not express any consideration it is void, where the Statute of Frauds, as in Alabama, requires the consideration to be expressed in writing. *Leonard v. Vredenburg*, and other cases above cited; *Rigby v. Norwood*, 34 Ala. 129.

The demurrer to the twelfth plea, therefore, should have been overruled and judgment rendered thereon for the defendant, unless the court saw fit to permit the plaintiff to file a replication to that plea.

It was argued on behalf of the original plaintiff that the validity and effect of the guaranty must be governed by the general commercial law, without regard to any statute of Alabama. But there can be no doubt that the Statute of Frauds, even as applied to commercial instruments, is such a law of the State as has been declared by Congress to be a rule of decision in the courts of the United States. Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat. § 721; *Mandeville v. Riddle*, 1 Cranch, 290, and 5 Cranch, 322; *DeWolf v. Rabaud*, 1 Pet. 476; *Kirkman v. Hamilton*, 6 Pet. 20; *Brashear v. West*, 7 Pet. 608; *Paine v. Central Vermont Rd.*, 118 U. S. 152, 161.

The eighth plea was payment. The defendant introduced no evidence to support this plea, and has therefore no ground of exception to the rulings and instructions at the trial of the issue joined thereon.

But the erroneous ruling on the demurrer to the twelfth plea requires the judgment to be reversed and the case remanded to the Circuit Court for further proceedings in conformity with this opinion.

THE PRESIDENT, ETC. OF THE OXFORD BANK v.
HAYNES.

Supreme Court of Massachusetts, September, 1829. 8 Pick. 423.

A guaranty is a conditional undertaking, and the guarantor is liable only upon default of the principal debtor, and he is entitled to notice of such default, where a failure to give him notice would cause a loss to him. A surety is an original promisor, primarily liable.

ASSUMPSIT upon a promissory note, dated on October 9, 1823, for \$1000, payable to the Oxford Bank in sixty days and grace.

On a case stated it appeared, that the note was made by Alpheus Smith and James Anderton as principal and surety, jointly and severally, and was offered at the bank for discount; but the bank refused to discount it, and the cashier wrote on the back of it the words, "I guaranty the payment of the within note," to which Smith procured the signature of the defendant. The note was then discounted at the bank, and the amount thereof was paid to Smith. A payment of \$250 was made by Smith at the maturity of the note, about the 1st of December, 1823, and no notice of the non-payment of the residue was given to the defendant. The note so remained until October 7, 1824, when an action was commenced upon it against Smith, and one Southgate was summoned as his trustee. Judgment was rendered in that action in March, 1825, and Southgate paid on the judgment the amount in his hands, being \$535; and nothing has been paid upon the note or judgment since. Smith and Anderton were reputed to be men of property at the time of making the note and so continued until the time of their failures. Smith failed about the 23d of January, 1824, and Anderton in February following, each being possessed of visible and attachable property much exceeding the amount of the note, and which was attached and levied on by their other creditors. Since their failures they have continued insolvent.

Smith lived about ten miles from the Oxford Bank and in the same village with Haynes, at the date and maturity of the note. Anderton lived between this village and the bank, and about six miles from the bank.

On the 7th of October, 1824, the directors of the bank chose a committee to go to Leicester to effect an adjustment of the affair, and notice was then given to Haynes that the note had not been paid. Haynes had never given the plaintiffs notice of the failure of Smith and Anderton, nor requested the plaintiffs to collect the note. Both Smith and Anderton, previous to their failures, were in the habit of doing business at the Oxford Bank.

The plaintiffs were to become nonsuit or the defendant to be defaulted, according as the court should order.

The declaration contained two counts; one charging the defendant as an original promisor, the other as a guarantee.

[Argument reported.]

PARKER, C. J. . . . It is very clear from the facts stated, that the bank might easily have secured the amount of the note, had they attempted to do it when it became payable, or within a month afterwards; and that Haynes, the defendant, had he been seasonably called upon and been notified of the non-payment of the note, might without difficulty have obtained security from the property of either or both of the promisors. Had he been an indorser of the note, most clearly by the above facts he would have been discharged, not only because the condition of giving notice was not strictly complied with, but because there was gross negligence on the part of the bank, and a new credit given to the promisors without the consent of the indorser.

Haynes therefore cannot be liable unless by the form of his contract he became answerable at all events, and unconditionally, for the payment of the note. And it is contended that this is the legal effect of the contract of guarantee into which he entered.

It is somewhat extraordinary, that the nature of this contract, and the extent of the liability it creates, are not very clearly settled in the books. It has been sometimes held to be an absolute, sometimes a conditional obligation. Sometimes a guarantee has been deemed a surety, and at others, not more than an indorser. And this perhaps has arisen from the different forms in which the contract has been made. In several cases, where the party put his name on the back of the note, without any words written over it at the time, he not being the payee of the note, he has been charged as an original promisor, being considered in the light of a surety, and he has been declared against as such; but in these cases his signature was given at the time of making the note, or in so short a time afterwards, and under such circumstances, as to have relation to the making of the contract originally. The case of *Josselyn v. Ames*, 3 Mass. 274, is of the first class, and that of *Moies v. Bird*, 11 Mass. 436, of the second. In other cases, the signature of a third party, not named in the note, has been given a long time after the making of the note, and without any circumstances showing that the third party had any concern in the original contract. Such was the case of *Ulen v. Kittredge*, 7 Mass. 233.

In the first class of cases, the holder of the note has been allowed to treat the person whose name is on the back, as a surety or original promisor, without any proof of consideration, other than as against the person who signed his name under the note, or of any actual promise on his part to pay, except what is derived from

his signature to the note. In the second class of cases, proof has been required of the promise or engagement to become liable, and he is to be charged in no other form than is consistent with that engagement; and it being a collateral engagement to pay the debt of another, there must be proof of a consideration for the promise. The distinction is clearly stated in the case of *Hunt v. Adams*, 5 Mass. 361.

But the cases above cited where the party signing on the back of the note has been held to be an original promisor, are where the signature is in blank, and not where a special undertaking is written over it.¹ In such cases the party chargeable, the note being negotiable, gives authority to the payee or holder to write over his signature such words as will bind him to the payment, not as indorser, for he cannot be such technically to a note not negotiable, but as a promisor, surety, or guarantee, at his election. No such authority exists, where the tenor and form of the undertaking are already drawn out before the signature of the party.

In the case before us, the signature of the defendant was not in blank, but under the words written by the cashier, the agent of the plaintiffs, which import a guarantee only. This is the only character in which he can be made liable, and if by law a guarantee is not an original promisor, he cannot be sued as such.

We therefore must consider what is the liability of a guarantee upon a promissory note; whether he is liable at all events, or only upon condition; and if the latter, whether the condition has been here performed.

This is the point which we think is undecided in this Commonwealth, though there have been many allusions to it in cases such as have been mentioned, in which the question was in relation to the liability of a surety, or of one who put his name on a note not negotiable, or where the party so putting his name had no authority to assign, not being the payee. But no case, in which the contract was in terms a guarantee, and so intended by the parties, has been presented to the court. That a guarantee differs in character from a surety cannot be questioned, for he cannot be sued as promisor, as the surety may; his contract must be specially set forth. That he differs from an indorser is equally clear, and for the same reason; and also because he warrants the solvency of the promisor, which the indorser does not, he being answerable on a strict compliance with the law by the holder, whether the promisor is solvent or not. There are cases which adopt a distinction which is reasonable and just, in which the guarantee is discharged only by the joint effect of negligence on the part of the holder, and an actual loss or prejudice to the guarantee in consequence of that negligence. It is certainly conformable to the general principles of right and justice,

¹ See *Union Bank v. Willis*, 8 Met. 504, *ante*, p. 73; changed by N. I. L. § 81.

that the creditor who knows of the delinquency of his debtor, and withholds information of it from the guarantee, by reason of which the debt is actually lost, when it might have been saved by either, should not throw the loss upon the guarantee. It is contrary to the general principles of equity upon which the law of contracts is considered to rest. Can it be supposed that a creditor holding the note of one thought to be in good credit, and who has ample means of paying, shall have a right, when he finds there is an inability to take up the note on its becoming due, to receive partial payment, give further credit, and thus put the debt in jeopardy, and after he has indulged the debtor *ad libitum*, shall call upon the guarantee for the deficiency, when absolute insolvency has taken place and all other creditors have saved themselves out of his effects? This would offend all the analogies of the law, which require good faith and diligence, to enable a creditor to call upon parties consequentially liable, and would place a guarantee in a worse condition than a surety; who, being an original promisor, may take up the note when it becomes due and sue the principal immediately. The glaring injustice of such a position has been discountenanced by those courts which have had the question presented distinctly to them.

In 8 East, 242, Lord Ellenborough says the same strictness of proof is not necessary to charge the guarantee, as would have been necessary to support an action on the bill itself, that is, against an indorser, where, by the law merchant, a demand upon and refusal by the acceptors must have been proved, in order to charge the other party on the bill, and this, notwithstanding the bankruptcy of the acceptors. Guarantees insure the solvency of the principals, and therefore, if the latter become bankrupt and notoriously insolvent, it is the same thing as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them. Lawrence, J., says, though proof of demand of the acceptors, who had become bankrupt, were not necessary to charge the guarantees, yet the latter are not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them. Le Blanc, J., says, it is sufficient as against a guarantee, that the holder of the bill could not have obtained the money by making a demand upon the bill.

And in 2 Taunt. 206, it was decided that a guarantee is entitled to notice, if the parties to the bill are not insolvent at the time it is due.

But the principle is more accurately and intelligibly stated by Duncan, J., in the case of *Cannon v. Gibbs*, 9 Serg. & R. 202. "I think," says he, "upon a review of these cases, the line is clearly marked out. It is this: that the guarantor is discharged, if notice is not given of non-payment to him, that he may avail himself of proper presentment, demand, and of due notice of non-payment

where the drawer and indorser, or either of them, are solvent at the time the note became due. But where both are then insolvent, this would be *prima facie* evidence that a demand on them, and notice to the guarantor, would be of no avail, and therefore, the giving notice to a guarantor, not a party to the bill, would be dispensed with, the presumption being, that the guarantor was not prejudiced by the want of notice."

And this seems to be the true ground; for it leaves the loss upon the party whose gross negligence is the cause of loss to any one, instead of throwing it upon him who would suffer entirely from the carelessness of the party who would recover of him. Upon this principle we decide the present case in favor of the defendant, without trenching at all upon the decisions relating to the liability of sureties, or those who, by signing their names in blank upon notes not negotiable, are regarded as *quasi* sureties; this being clearly a contract of guarantee only, in its form, and subject to the rules which govern that species of contract. It is clear that both the promisors in the note were solvent when it became due, and that they had abundant property liable to attachment. But the plaintiffs, with the knowledge of their delinquency, lay by nine months, during which time their property was sacrificed and all hopes of obtaining payment were by that means lost. Some intimations were made in the argument, that it was the usage of the bank, when notes have been discounted, to suffer a renewal from time to time, on the payment of a certain portion of the sum loaned, as the notes should become due. It is not stated in the case agreed, that there was such a usage, or that the defendant knew of it. If at the time he gave his guarantee there was any such usage, or any stipulation to that effect, and this was known to the defendant, it may be questionable whether the want of notice would avail him in defence.

Plaintiffs nonsuit.

CLARK v. SICKLER.

Supreme Court of New York, February, 1876. 64 N. Y. 231.

One who is bound on a contract of assurance, is discharged by any act on the part of the creditor, in dealing with the debtor, which act operates to the legal injury of the assurer.

THE case is stated in the opinion.

[Argument reported.]

CHURCH, C. J. This action is upon a promissory note made by one Mott, as the principal debtor, and by the defendant's intestate

as his surety. The referee found that Mott, the principal debtor, some time after the note was due, went to the holder with the money to pay it, which the latter (by his wife acting for him with authority), declined to receive, giving as a reason that he had no use for the money, and requested that Mott would keep it. It is also found that Mott was then solvent, and afterward became insolvent, and the question is, whether the surety is discharged. As a matter of abstract equity, the argument is plausible, at least, that inasmuch as the note was not paid by reason of the request of the holder, the latter ought not to enforce it against the surety after the principal debtor had become insolvent. The general rule applicable to the relation of creditor and surety is stated by Judge Story as follows: "If a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him." 1 Story's Equity, §§ 325, 326, and cases cited in note. The current of authority, which I think is quite harmonious, establishes that the act which will discharge a surety must be legally injurious or inconsistent with his legal rights. An agreement with the principal debtor extending the time of payment, or in any manner changing the contract made by the surety, will have that effect. So the release of a security held by the creditor and the like. The facts found by the referee do not present a case within the rule. The contract was not changed. The time was not extended by any binding agreement. An action might have been brought immediately after the transaction in respect to the payment, and the circumstances which took place would not have constituted a defence. It is well settled that mere indulgence will not discharge a surety. *Thompson v. Hall*, 45 Barb. 214; *Schroeppel v. Shaw*, 3 N. Y. 446; *Fulton v. Matthews*, 15 Johns. 433. The holder preferred not to collect the note and gave indulgence, but not a stipulated extension. The other principle referred to is, that the surety may be discharged from an omission of duty on the part of the creditor, but the surety must intervene and request the performance of the duty. It has been established, accordingly, that if a surety request the creditor to sue, and the latter neglects to do so, the surety will be discharged if the neglect has produced injury. *Remsen v. Beekman*, 25 N. Y. 552. Here there was no request. The surety did nothing. He was not prevented from demanding prosecution by the creditor, nor from paying the note and prosecuting the principal himself.

We are now asked to go a step further and hold that if a note is not paid because the creditor prefers to give indulgence rather than receive payment, the surety is discharged if the principal debtor happens to become insolvent. We have not been referred to

any authority for such a precedent. The case of *Lewis¹ v. Van Dusen*, 25 Mich. 351, was upon a guaranty of collection. It does not appear distinctly upon what ground the court placed its decision; but the question of diligence was necessarily involved, besides the refusal to accept the money when offered, and there was a neglect to prosecute for two years, during which the guarantor became insolvent. The decision was clearly right without the fact of the offer to pay, and that circumstance only aggravated the laches. In the case cited from 46 Vt. 258, *Joslyn v. Eastman*, there was a tender of the money due, which was held to discharge the surety, although not accepted. On the other side, the recent case in this court of *The Second National Bank of Oswego v. Poucher*, 56 N. Y. 348, decided that where a debtor owing two demands offered to pay one of them, and was induced by the creditor to pay the other, the indorsers upon the demand not paid were not discharged. The circumstances which will discharge a surety are well defined by repeated adjudications, viz., the doing an act which is legally injurious to the surety, or which impairs his legal rights, or the omission to perform a duty when required by a surety, which omission results in injury to the surety. Indulgence to a debtor is not sufficient, and the distinction is not apparent between indulgence, with the express consent or even request of the creditor, and mere silent delay, provided the contract is not changed or impaired. It is a common occurrence for debtors to ask indulgence without any specified time, and creditors would constantly be in danger of losing their debts by mere negative acquiescence. The facts presented in this case rarely occur. It is not often that the debtor omits to pay at the request of the creditor, but if we enlarge the grounds for discharging a surety in such a case, we shall establish a precedent which may prove highly injurious in unsettling and weakening the obligations of written instruments. It is better to adhere to established general rules than to attempt to work out equity in exceptional cases.

It is quite evident that the creditor had no idea of discharging the surety. He did not prevent the payment of the note. He did not refuse to receive the money. He only expressed a desire that it should not be paid. There was no tender or attempt to tender the money. The contract was not changed. The surety did not intervene and request any action on the part of the creditor; and although loss has occurred in consequence of the indulgence, it cannot be affirmed that the creditor did any act impairing the legal rights of the surety, nor did the latter take any action to relieve himself from liability.

The judgment must be affirmed.

All concur.

Judgment affirmed.

¹ *Sears v. Van Dusen*, 25 Mich. 351, is probably intended.

NEWCOMB v. RAYNOR.

Supreme Court of New York, May, 1839. 21 Wend. 108.

An indorser is so far a surety for prior parties that a discharge of them discharges him;¹ e. g. if the holder of a promissory note release the first indorser, this discharges the subsequent indorsers.

ASSUMPSIT against the maker and second and third indorsers of a promissory note. Plea by the indorsers that the holder had given a release under seal to Goings, the first indorser. Demurrer to the plea.

[Argument not reported.]

NELSON, C. J. I am of opinion the plea constitutes a good bar to the action. As between the first and subsequent indorsers, the former must be regarded in the light of principal; he stands behind them upon the paper, and is bound to take it up, in case of default of the maker. A discharge of him, therefore, by the holder (regarding the relative position of the parties), on general principles, operates to release them.

It is said their rights are not prejudiced, as they may still resort to an action against him if subjected to the payment of the note, as the release leaves the implied contract existing between the first and subsequent indorsers unimpaired. Conceding this to be so, to permit a recovery against the defendants would but lead to an unnecessary circuitry of action. The plea shows a discharge for a presumed good consideration (as it is under seal) of the first indorser, and it cannot be doubted, as the case stands, that if the defendants should be obliged to call upon him, the plaintiff would be bound to take his place. The case, therefore, comes within the familiar rule that a release of the principal operates to discharge the surety.

It is further said that Goings may not have been legally charged as an indorser. If this were so, the plaintiff should have replied the fact, as we will not presume it in the face of the acts of both him and the plaintiff to the contrary. The release would not have been necessary on such a supposition.

Judgment for defendants on demurrer; leave to amend on usual terms.

¹ N. I. L. § 137.

McLEMORE v. POWELL.

Supreme Court of the United States, January, 1827. 12 Wheat. 554.

But a mere agreement to give time to the debtor, which agreement is not founded on consideration, will not discharge the surety;¹ e. g. agreement by the holder with the drawer of a bill of exchange for delay, made without consideration, and not communicated to the indorser, does not discharge the indorser.

THE case is stated in the opinion of the court.

[Argument not reported.]

STORY, J. This is a writ of error to the Circuit Court of the United States for the District of West Tennessee.

The original action was *assumpsit*, brought by Powell, Fosters, & Co., as holders of a bill of exchange, drawn by one Thomas Fletcher, in May, 1819, at Nashville, upon Messrs. McNeil, Fisk, & Rutherford, at New Orleans, payable to Thomas Read, or order, for \$2000 in sixty days after date, and by him indorsed to the defendant, John C. McLemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, McLemore, examined as a witness, and, among other things, testified that, in the month of October following the dishonor of the bill, "one of the plaintiffs applied to him at Nashville for the money on the bill, and threatened to sue immediately if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness he was going to Louisville, Kentucky, and would return by Nashville, about the expiration of that time, and would receive said payment. Since said time, the witness has never seen said plaintiff." The witness further testified that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him that the bill would be left with a Mr. Washington, at Nashville; that he expected he would himself be at that place at the time agreed on, but that, if he did not come, he would give the instructions to Mr. Washington, by letter, what to do if the witness did not pay at the expiration of the time agreed on. It did not appear that any consideration was paid or stipulated for this delay; and no suit was commenced until after this period had elapsed. The district judge instructed the jury that, if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four

¹ N. I. L. § 137, 6.

or five weeks, and that no premium or consideration was given or paid, or to be paid by Fletcher, the indorsers were not discharged; that an agreement for giving day must be an obligatory contract for a consideration which ties up the hands of the creditor and disables him from suing, thereby affecting the interests and rights of the indorser; that the indorser has a right to require and demand of the creditor to bring a suit against the drawer, and if he has disabled himself from bringing a suit by a contract for a consideration, he has thereby released the indorser; and that if the jury were satisfied from the testimony that time was given for a valuable consideration paid or to be paid, or that a new security was taken by the holder, the indorser was discharged and absolved from all the obligations of the indorsement.

Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the court; and the present writ of error is brought for the purpose of ascertaining its legal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to reinstate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties. The same reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence by suit against the principal. Without expressing any opinion on this point, it is sufficient to say that the error, if any, was favorable to the defendant, and, therefore, it can form no subject of complaint on his part.

The case then resolves itself into this question, — whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with or assent of the indorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself. And we are all of opinion that it is not. We admit the doctrine that, although the indorser has received due notice of the dishonor of the bill, yet if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case, the jury have found that there was no consideration for the

promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord Eldon, in *English v. Darley*, 2 Bos. & Pul. 61, that "as long as the holder is passive, all his remedies remain;" and, we add, that he is not bound to active diligence. But, if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and, if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present action. In *Walwyn v. St. Quentin*, 1 Bos. & Pul. 652, where the action was by indorsees against the drawer of a bill, it appeared that, after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account from the indorser; and to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer that they would not press him. The court held it no discharge; and Lord Chief Justice Eyre, in delivering the opinion of the court, said that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it was clear the drawer would have been discharged, for it would be giving a new credit to the acceptor. But that, after protest for non-payment, and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor. He might forbear to sue him. The same doctrine was held in *Arundel Bank v. Goble*, reported in a note to Chitty on Bills. Chitty, 379, note c, ed. 1821. There the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended that this was a discharge of the drawer; but the court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding that interest should be paid by the acceptor made no difference. So, in *Badnall v. Samuel*, 3 Price's Exch. 521, in a suit by the holder against a prior indorser of a bill of exchange, it was held that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place during the negotiation, because there was no binding contract which precluded the plaintiffs from suing the acceptor at any time.

Upon authority, therefore, we are of opinion, that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice, is founded upon the notion that the stipulation for delay suspends the present rights and remedies of the holder.

The judgment of the court below is, therefore,

Affirmed with costs.

SOHIER v. LORING.

Supreme Court of Massachusetts, November, 1850. 6 Cush. 537.

Nor does a binding agreement to give time to the primary debtor discharge the surety, if the creditor has expressly reserved his rights against the surety;¹ e. g. a composition deed, whereby the holder of a bill of exchange gives time to the acceptor and agrees to discharge him on receiving a portion of the debt, reserving the holder's remedies against other parties to the bill, does not discharge the drawer and indorsers.

THIS was an appeal from a decision of Ellis Gray Loring, Esquire, a master in chancery, overruling the motion of the appellant, as assignee of Edward H. Green & Company, insolvent debtors, to expunge or reduce the amount of certain claims, proved before the master against the estate of Green & Company.

The case was submitted to the court upon the following agreed statement of facts: On the 23d of February, 1846, a warrant was issued by the said master, against the estate of Edward H. Green and John E. Short, both of Boston, merchants and partners, doing business under the firm of Edward H. Green & Company. The first publication of the notice required by the warrant was made on the 24th of February, 1846, and, on the 11th of March following, the appellant was chosen assignee, and duly received an assignment of all the insolvent's estate.

Previous to their insolvency, Green & Company, as copartners, were employed by Oliver P. Mills, of New York, to make and negotiate certain bills of exchange, drawn on the firm of Major & Wallace, of London; and from time to time, as opportunity offered, Green & Company had drawn on account of Mills various bills of exchange, against consignments of goods in the hands of Major & Wallace belonging to Mills, which bills were sold in the usual course of business to the appellees. Green & Company, for a commission paid to them by Mills, had become responsible as the drawers or indorsers of these bills, which were duly accepted by Major & Wallace, but were not paid at maturity. Notice of their dishonor was duly

¹ N. I. L. § 137, 5 and 6.

sent to the drawers, and the bills were taken up by the appellees, and proved by them against the estate of Green & Company.

The appellees, whose claims were thus proved, Hawes, Gray, & Company, proved on the 10th of March, 1846; Benjamin Loring and Levi H. Marsh, executors of Elijah Loring, proved on the 20th of March; Thomas Tarbell & Company proved on the 29th of April, 1846; and Samuel May & Company proved on the 18th of January, 1847; the whole amounting to about \$26,000.

The bills proved by Hawes, Gray, & Company were drawn by Mills payable to his own order, and indorsed by him to the order of Green & Company, and by them indorsed. The bills proved by the other appellees were drawn by Green & Company on account of Mills. All the bills were directed to Major & Wallace, and were by them accepted. The several appellees sent their bills to England in payment of debts or to make purchases there during the months of November and December, 1845; and the bills were at maturity returned to them dishonored, by due course of mail.

At a meeting of the parties holding bills drawn by or by the order of Oliver P. Mills held in London, on the 5th of June, 1846, a proposition for compromising their claims against Major & Wallace on these bills was agreed to; and, on the 23d of December following, an indenture for that purpose was drawn up and executed in London, by Major & Wallace, by these bill-holders, including the appellees, by their respective agents, and by certain trustees appointed under the composition deed. This composition deed recited that Major & Wallace, being unable to pay in full all their debts, had proposed to pay their creditors, including the parties holding bills drawn by or by the order of Oliver P. Mills and accepted by Major & Wallace, a composition of five shillings in the pound, on the amount of their debts, by three equal instalments, payable at three, six, and nine months from the date of the deed, and to be secured by promissory notes of James Wallace, payable at those periods respectively, in full satisfaction and discharge of such debts; and that their creditors, including said bill-holders, had consented to and agreed to accept such composition; and that the bill-holders, had received in addition to this composition four shillings in the pound in money. Major & Wallace by this deed assigned certain goods to certain trustees therein named, in trust to sell and convert the same into money, and divide the proceeds among the bill-holders, parties to the composition deed; and the bill-holders covenanted not to sue Major & Wallace on said bills of exchange, unless on default of payment of the notes of James Wallace; and that upon payment of those notes to the trustees, the bill-holders would release Major & Wallace from the said bills of exchange. Then followed this clause: "Provided always, and it is hereby expressly agreed and declared, that it shall be lawful for the said bill-holders, parties

hereto of the second part, to execute these presents without prejudice to their rights and remedies upon the said bills, mentioned in the second schedule hereunder written, respectively, or upon collateral or other securities for the same, respectively, against any person or persons whomsoever other than the said McKedy Major and James Wallace, or either of them, their or either of their heirs, executors, and administrators; and that notwithstanding these presents, or anything herein contained, they, the said bill-holders respectively, and their respective executors, administrators, and assigns, shall be at liberty to enforce and adopt all or any of such rights or remedies, against any such other person or persons, in the same manner as if these presents had not been executed." And the bill-holders covenanted to indemnify the trustees, from all claims for or on account of the goods assigned to them in trust, or the payment of any dividend out of the proceeds thereof.

The dividends, which were made under this indenture, amounting to four shillings in the pound, have been received by the appellees respectively.

On the 4th of August, 1847, the appellant, as the assignee of Green & Company, filed with the master in chancery a written motion, that the claims of the several appellees should be expunged from the list of debts proved against Green & Company; or, if not expunged, that they should be reduced in amount, by deducting therefrom the payments received by the appellees, respectively, under the provisions of the composition deed; but the master, after due hearing, overruled the motion, and the assignee appealed to this court.

It was agreed, that if the court should sustain the master's decision, judgment should be entered for the appellees; but if the court should reverse the decision of the master, the case might be sent to a jury, to be tried on such issue or issues as the court should direct, or otherwise disposed of as they should determine.

The case was argued in writing.

[Argument reported.]

METCALF, J. The composition made with the acceptors would have discharged the drawers and indorsers, if there had not been inserted in the composition deed a proviso that it should not prejudice the holders' remedies against any other parties besides the acceptors. Bayley on Bills (2d Amer. ed.), 357, 358. The first question in the case therefore is, what is the legal effect of that proviso?

It is settled in England that a discharge or giving time by a creditor to his principal debtor, will not discharge the surety, if there be an agreement between the creditor and the principal debtor that the surety shall not be discharged. And this rule of law is applicable to parties to bills of exchange and promissory notes, who are liable

only on the failure of prior parties, though they are not technically sureties of those parties. 1 Steph. N. P. 936; Montagu on Composition, 36; Burge on Suretyship, 210; Chit. on Bills (10th Amer. ed.), 420; Byles on Bills (2d Amer. ed.), 202. See also Mallet v. Thompson, 5 Esp. R. 178. The same doctrine was advanced by Messrs. Hamilton and Riker, in argument, and was recognized by the Supreme Court of New York, in *Stewart v. Eden*, 2 Caines, 121, very soon after it had been laid down by Lord Eldon, in *Ex parte Gifford*, 6 Ves. 805. In this last case, Lord Eldon said sureties would not be discharged by a discharge of the principal, if there was "a reserve of the remedy" against the surety, and that Lord Thurlow had so admitted in a previous case not reported. He afterwards laid down this principle more authoritatively in *Boulton v. Stubbs*, 18 Ves. 20, and *Ex parte Carstairs*, 1 Buck, 560. In *Ex parte Glendinning*, 1 Buck, 517, he said: "If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor."

In *Nichols v. Norris*, 3 Barn. & Adolph. 41, the Court of King's Bench decided that a composition like that in the present case, made with the indorser of a note given for his accommodation, did not discharge the maker. It was said by the court, that such composition deeds were very common, and that the special proviso took the case out of the common rule as to the discharge of sureties by giving time to the principal.

In 1846, the case of *Kearsley v. Cole*, 16 Mees. & Welsb. 128, came before the Court of Exchequer. That was an action for money paid for the defendant, for whom the plaintiff had been surety. The defence was, that the defendant had made an assignment to his creditors, who had covenanted not to sue him. But it appeared that there was a proviso, in the deed of assignment, that any creditor might execute it without prejudice to any specific lien or security, or to any claim against any surety, and that this proviso was inserted with the knowledge and consent of the plaintiff. He was afterwards called on as surety of the defendant, and paid the claim. The question was, whether this payment was to the use of the defendant, or was a voluntary payment, which gave him no right to reimbursement. The court held that the plaintiff was entitled to recover; he not having been discharged from his suretyship by the deed of assignment. The opinion of the court was given by Mr. Baron Parke, who fully and clearly stated the decisions, and the principles upon which they were made, as follows: "The question is, what is the effect of a discharge with reserve of remedies consented to by the surety? We do not mean to intimate any doubt as to the effect of a reserve of remedies without such consent; and the cases are numerous that it prevents the discharge of a surety, which would otherwise be the

result of a composition with, or giving time to, a debtor, by a binding instrument; and the reserve of remedies has that effect upon this principle, — first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if, the instant afterwards, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him. This is the effect of what Lord Eldon says in *Ex parte Gifford*, and *Boulton v. Stubbs*, as to the reserve of remedies; and the general proposition, that, with that recourse, the composition or giving time does not discharge the surety, is supported by those and the following cases: *Ex parte Glendinning*; *Nichols v. Norris*; *Smith v. Winter*, 4 Mees. & Welsh. 454, and others. This point must, therefore, be considered as settled. Some remarks have, indeed, been made by Lord Denman, in the case of *Nicholson v. Revill*, 4 Adolph. & Ellis, 675, on the doctrine of Lord Eldon in *Ex parte Gifford*, throwing doubt on its correctness, on the supposition that Lord Eldon had held that a creditor could release one joint and several debtor, and hold another liable by a reserve of remedies; which would certainly be against the decision in *Cheetham v. Ward*, 1 Bos. & Pul. 630, unless the instrument of release could, by reason of the context, be construed to be covenant not to sue, as it was in the case of *Solly v. Forbes*, 2 Brod. & Bing. 38. But we consider it clear that Lord Eldon meant only to apply the doctrine to cases where there was *no release*, but a composition, or giving time, not amounting to a *release*, which is the present case; and, with reference to it, the rule laid down by Lord Eldon is not impeached by Lord Denman's remarks." And the decision of the court was, that the surety's consent to the creditors' reserve of their remedy against him did not alter the law of the case in favor of the principal.

These doctrines were incidentally recognized by Mr. Justice Wilde in *American Bank v. Baker*, 4 Met. 175, and were adopted and applied by the Court of Appeals of Maryland, in *Clagett v. Salmon*, 5 Gill & Johns. 314.

It is very obvious, that a principal debtor may gain little or nothing by such a composition as this with his creditor; inasmuch as he is left liable to the like proceedings against him by his sureties, which his creditor might have instituted if no composition had been made. But if he pleases to subject himself to that liability, by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement.

On these grounds, we are of opinion that the holders of the bills,

in the present case, were rightly permitted by the master to prove their claims thereon against the drawers and indorsers; the latter not having been discharged by the composition made by the former with the acceptors.

The second question respects the amount which the holders were entitled to prove against the drawers and indorsers. And we are of opinion that each was entitled to prove the full sum due and unpaid, at the time of making proof, on the bill or bills held by him. This question is not settled by any provision in our insolvent laws; and we therefore adopt the rule applied in bankruptcy. That rule is, that a holder may prove his claim, under commissions against the drawer, acceptor, and indorser, and receive a dividend from each upon his whole claim, provided he does not receive, in the whole, more than his full due. But there is a distinction in this case, when a holder applies to prove his debt against one party, after having received a part of it from another, and when he applies to prove before receiving any payment or composition from another party, or before a dividend has been declared in his favor, under a commission against another party. Any sum actually received in payment, from any party to a bill, before proof made against another, must be deducted from the amount to be proved against any other party. So, as a general rule, must the amount of a dividend, declared on the estate of another party, be deducted. *Cooper v. Pepys*, and *Ex parte Wildman*, 1 Atk. 107, 109; see 5 Ves. (Perkins's ed.) 449, note; *Eden's Bankr. Law* (2d ed.), 155; 1 Mont. & Ayr. Pract. in Bankruptcy, 202, 203.

In the present case, we regard the composition made with the acceptors, on the 23d of December, 1846, as payment of one fifth of the amount of the bills. The acceptors then conveyed property in trust to pay one-fifth, and the holders accepted that conveyance. But all the holders, except May & Company, made proof of their claims against the estate of Green & Short, drawers or indorsers, before they made the composition with the acceptors, and were therefore entitled, according to the rule just stated, to prove the full amount then due on their bills. May & Company having made proof after they had executed the composition deed, by which they, in legal effect, had received part payment from the acceptors, were entitled to prove only the amount due after deducting that payment.

The proceedings of the master, from which this appeal was taken, are affirmed in all things, except as to the amount proved by May & Company, which is to be reduced by deducting the sum received by them under the composition with the acceptors.

FARMERS' AND MECHANICS' BANK *v.* RATHBONE.

Supreme Court of Vermont, December, 1852. 26 Vt. 19.

So an accommodation party is an assurer,¹ not, however, in the full common-law sense; a discharge of the accommodated party will not discharge the accommodation party. E. g. one who for value has taken a bill of exchange accepted for the accommodation of the drawer, without notice of the fact, may afterwards release the drawer without discharging the acceptor, though he then have notice of the nature of the acceptance.

ASSUMPSIT on two bills of exchange for \$600 each, accepted by the defendant, payable to order and indorsed before maturity, for value and without notice, to the plaintiff. Defence, that the bills were accepted without consideration for the accommodation of the drawer, Caleb E. Barton, and that the plaintiff released and discharged the drawer after having acquired knowledge of the nature of the acceptance. The release was long after the plaintiff's purchase of the bills.

The said release was as follows:

"In consideration of \$500 to the Farmers' and Mechanics' Bank, paid by Caleb E. Barton, of Charlotte, the said bank hereby wholly release and discharge the said Barton from all liability or indebtedness to said bank, which said bank have or may claim to have for, or on account of, any and all notes, cheques, drafts, or bills of exchange or acceptances to which Henry Rathbone is in any wise a party, either as maker, drawer, indorser, or acceptor or payee or drawee, and also from all liability on any paper which has been sued against said Barton in favor of said bank, or any other paper said bank may have against Barton, previous to the 17th of March instant, which said Rathbone was or is any wise a party to.

In witness whereof, we have hereunto affixed the seal of said bank, at Burlington, this thirtieth day of March, A. D. 1848.

(Signed) FARMERS' AND MECHANICS' BANK. [L. S.]
By JOHN PECK, *Pres't.*"

The County Court rendered judgment for the defendant. Exceptions by plaintiffs.

[Argument reported.]

ISHAM, J. This action is brought on two bills of exchange, drawn by Caleb E. Barton on the defendant, Henry Rathbone, of the city of New York; both of which were duly accepted, and, before maturity, were discounted, and transferred by indorsement to the plain-

¹ *Burton v. Slaughter*, 26 Gratt. 914.

tiffs. When the bills matured, they were dishonored, duly protested, and notice thereof given to the drawer.

On the trial of the case, at the circuit, the defendant insisted that the bills were accommodation bills; and, upon the facts stated in the bill of exceptions, he now insists that the bills are of that character, that the drawer is the person primarily liable, that the acceptor stands as his surety, and that the release of the drawer by the plaintiffs operates as a discharge of the defendant as acceptor. It is admitted that if these bills are not accommodation bills, but are really bills for value, the release will not affect the liability of the acceptor. It will discharge all persons intermediate between the holders and drawer, but not those prior on the bills, nor those on whom rests a primary or absolute liability to pay them. *English v. Derby*, 2 B. & P. 61; *Bailey, J., in Claridge v. Dalton*, 4 Moore & S. 226; *Chitty, Bills*, 451.

We are satisfied that these bills are not to be treated as accommodation papers. It is true the fact is found in the case, "that, at the maturity of the bills, the drawer was indebted to the acceptor on account, apart from the bills in suit, and that the latter had no funds in his hands of the former, wherewith to meet them." But, in connection with this statement, it equally appears from the exceptions that, during the season of 1844, the drawer at different times consigned to the defendant as commission merchant, for sale on his account, a quantity of cheese, the gross proceeds of which amounted to \$7848.78; and, from the statement in the account of sales, we perceive that a much larger amount than the sum of these bills was realized therefrom, after these acceptances were given. The account arising from the sale of this property commenced in July, 1844, and closed in November of that year. There has been no statement of that account rendered, or balance ascertained by the parties. As between them, the whole account remains open and subject to their future liquidation. While this account was accruing, these bills were drawn and accepted, obviously and with the understanding that they were to be paid by the defendant, and the amount so paid be entered into their general account.

During that period they doubtless anticipated that the balance would be sufficient to pay these bills, and have been respectively disappointed in the amount finally realized therefrom; so that there is now a balance due the acceptor, as stated in the account of sales. But as these bills, at first, were drawn upon property consigned to the acceptor, and he accepted them with the same means of knowledge which the drawer had, and thereby assumed the primary obligation to pay them, there is no propriety in treating the bills otherwise than as creating obligations of that character, after they have passed, in due course of business, into the hands of an indorsee. In so treating them, we are manifestly carrying into effect the mutual

intention of the parties when the bills were drawn and accepted; for it is distinctly stated in the case that both the drawer and the drawee supposed and believed that there were funds sufficient in the hands of the drawee to pay them at maturity, and under that belief the drawer made such representations to the plaintiffs, at the time of their indorsement and discount.

The legal effect and character of bills of exchange, so drawn and accepted, is not changed or affected by any alteration of the balance of the account, not even by the fact, if it should be afterwards ascertained, that there was an indebtedness, at the time of the acceptance, from the drawer to the acceptor.¹ This principle is fully illustrated by the case of *Bagnall v. Andrews*, 7 Bing. 217. Indeed, the facts in that case, and the principles there established, have such a direct application to this case, that we cannot consider these bills otherwise than as bills for value, without entirely disregarding the authority and principles of that decision. In that case, when the bill was drawn, the drawer had an open account with the acceptor, for goods which he was in the course of sending to him for sale; neither of them at that time knew the state of the account; "and it afterwards turned out that the drawer was, at the time of the acceptance, indebted to the acceptor, instead of the acceptor being indebted to the drawer." Before the bill became due, the drawer became bankrupt, and indorsed the bill to the plaintiff, who was ignorant that an act of bankruptcy had been committed. The drawer being called as a witness was objected to as being interested, on the ground that this was an accommodation bill, and that, if the plaintiff recovered, he would be responsible to the defendant, not only for the amount of the bill, but for the costs of that suit. Tindal, C. J., after remarking that such consequences would follow if this was an accommodation bill, and that the witness would be incompetent, observed "that, we think, upon the facts in the case, the bill was not an accommodation bill. At the time it was drawn, the drawer had an open account with the defendant for goods sent, and which he was then in the course of sending to him for sale. The drawer might, at that time, reasonably expect that the acceptor would pay the bill out of funds that might be in his hands, when the bill arrived at maturity; for the evidence is express that, at the time the bill was drawn, neither the drawer nor acceptor knew the state of the account. A bill so drawn and accepted cannot be treated as an accommodation bill, nor, consequently, is there any implied obligation, on the part of the drawer, to indemnify the acceptor against the costs of any action which may be brought against him." 1 Phil. Evid. 61; 9 Serg. & Rawle, 237.

If that case is to be treated as sound in principle, it makes a final disposition of the case under consideration; for under that authority,

¹ Cf. *Dickins v. Beal*, 10 Peters, 246, *ante*, p. 152.

these bills cannot be considered as accommodation bills, but must be treated as bills for value; the acceptor being the party primarily liable, and the drawer considered only as his surety or guarantor. In such case, it was properly remarked that the release of the drawer was a relinquishment merely of so much security which the plaintiffs had for the payment of the debt, and which in no event can affect the liability of the acceptor.

It is very evident, also, that the plaintiffs could have sustained no action against the drawer of these bills, unless they had been duly protested and notice given. This principle is founded on the consideration that a primary liability for their payment rests only upon the acceptor; while that of the drawer is contingent and collateral, and arises upon the default of the acceptor. The necessity of protest and notice in such cases is not avoided by a fluctuating balance in their accounts, nor even by the fact, where there exists an open account, that there is an indebtedness from the drawer to the acceptor. *Orr v. Maginnis*, 7 East, 359; *Blackhaw v. Doren*, 2 Camp. 503; *In re Brown*, 2 Story's C. C. 502, 521; Story, Bills, § 311; 2 Smith's Lead. Cas. 29; Smith's Merc. Law, 315; 15 Peters, 393.

But if these bills are to be regarded strictly as accommodation bills the same result, we think, must follow. In such case it is insisted that the drawer is the person primarily liable; that the acceptor is to be treated as his surety; and that the holder of the bills is bound so to regard and deal with them, notwithstanding the terms of the bill, whenever he has notice that the acceptance was for accommodation, whether that notice was received at the time he took the bills or at any subsequent period.

It is proper to observe that this question does not now arise between the drawer and acceptor; as between them the consideration may be inquired into and the true relation of the parties shown; but the question is presented in a case between the acceptor and an indorsee for value without notice that the bill was for accommodation at the time he became the holder. When these bills were received by the plaintiffs, they were invested with those legal rights, and became subject only to those duties, that arose from what appeared on the face of the bills. Their legal effect and the relative liability of the drawer and acceptor could not be changed or altered by any fact not then appearing.

These principles have a peculiar application to bills of exchange, as they are designed for commercial purposes; and their application is required to impart to them that credit and currency which is necessary to insure the purposes for which they were intended. At the time the plaintiffs became indorsees they had the right, on the one hand, and were bound, on the other, both at law and in equity, to regard the acceptor as primarily liable, and the drawer as his

surety; they could have released, compounded with, or given time to the drawer, without in any way affecting their right to hold the ultimate liability of the acceptor. Story, Bills, §§ 429, 430; 15 Peters, 393; 1 Mees. & W. 374. Such being their right at the time they became the holders of the bills, there is no propriety or authority in saying that that right can be subsequently changed, or affected by a mere notice from the acceptor to the holder that the drawer had neglected to provide funds for the payment of the bills; or by any act of the drawer and acceptor to which the plaintiffs were not a party, and to which they have never given their assent. Theob. on Pr. and Sur. 216.

The plaintiffs, as holders of these bills, were not subject to any of the equities existing between the original parties, and without their assent those equities cannot be imposed upon them. The case of *Mallet v. Thompson*, 5 Esp. 178, was an action by an indorsee against the maker of an accommodation note for the payee. The holder received part-payment, under a composition from the payee, and covenanted not to sue him, which is a virtual release, knowing when he received the bill that it was given for accommodation. Lord Ellenborough ruled that the maker was liable, notwithstanding the payment and release; for his liability on the face of the note was primary and principal, and that of the indorsers was collateral and secondary; and, whatever may be their liabilities between themselves, such was their liability to the holder. It was also held that the release would have no effect between the maker and payee; for whatever the maker was compelled to pay he might call upon the payee to repay; the release in no way disturbed their relations. On the application of the same rule to this case, whatever the acceptor may be compelled to pay, he can call upon the drawer to repay, notwithstanding the release; for their relations are not disturbed by its execution. It is evident, also, in this case, from the release itself, that a discharge of the bill was not intended by the parties, but simply a release of the drawer, by the holders, from any farther claim which they had personally on him, leaving the holders to pursue their remedy against the acceptor as the party primarily liable. Story, Promissory Notes, § 423.

In the case of *Laxton v. Peat*, 2 Camp. 185, and *Collett v. Haigh*, 3 Camp. 281, a different doctrine was applied to accommodation bills, where the holder, at the time he received the bills, knew that they were for the accommodation of the drawer. Lord Ellenborough remarked "that as it was an accommodation bill, of which all parties had notice, the acceptor can only be considered as a surety for the drawer;" and the acceptor was discharged by time being given the drawer. If these cases can be sustained on principle, they have no application to this case; for it may be said with more propriety that if one take a bill of exchange, knowing at the time that it was

for accommodation, he thereby assents to receive and hold it subject to that equity of the parties; while no such suggestions can be made in this case, as these plaintiffs had no such notice when the bills were received and discounted.

The doctrine of those two cases was, however, subsequently shaken by Justice Gibbs, in *Kerrison v. Cooke*, 3 Camp. 362, and was afterwards overruled in the Common Pleas, in the case of *Fentum v. Pocock*, 5 Taunt. 192, in which Mansfield, C. J., observed "that the case of *Laxton v. Peat* was the first in which it was held that the acceptor was not the first and last person compelled to pay the bill to the holder; and that they were compelled to differ, and hold that it is impossible to consider the acceptor of an accommodation bill in the light of a surety for the drawer; and that, if the holder had known in the clearest manner that at the time of giving the bill it was for accommodation, it would make no manner of difference." With this view of the case, Heath, J., and Chambre, J., agreed. It will be at once perceived that in this case the acceptor was held as the principal and primary debtor on an accommodation bill, known to be such by the holder when he received it, and that act of the holder, which would have discharged a surety, was held not to affect his liability. We are not called upon in this case to approve or disapprove of the doctrine of that case to the extent to which it was carried; but it is a decided authority for saying that an indorsee for value of a bill of exchange, who became such before its maturity and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and that this right is unaffected by any subsequently acquired knowledge that the bill was given for accommodation. In such cases, it is regarded as a mere truism to say that a release of the drawer by the holder has no effect on the ultimate liability of the acceptor.

The case of *Fentum v. Pocock* has been sustained and approved by the subsequent cases in England. *Price v. Edmonds*, 10 Barn. & C. 578, 584; *Nichols v. Norris*, 3 Barn. & Adol. 41; *Harrison v. Courtauld*, 3 Barn. & Adol. 36; *Rolfe v. Wyatt*, 5 Car. & P. 181; *Moody & M.* 14; *Yallop v. Ebers*, 1 Barn. & Adol. 698, 703. It is to be observed also that the same view of the subject is entertained by the different elementary authors. *Chitty, Bills*, 344; *Smith's Merc. Law*, 332; 3 *Kent's Com.* 104; *Bayley, Bills*, 364; *Story, Promissory Notes*, §§ 418, 423.

This subject has arisen before many of the courts in this country, and the rule is generally sustained "that the parties to a bill or note are bound by the character which they assume upon the face of the bill. If by that they are liable as primary debtors or as principal; then, as to the holders, they are bound as such; and his knowledge

at the time when he takes the bill that they or either of them are accommodation parties will not vary the case." *Montgomery Bank v. Walker*, 9 Serg. & Rawle, 229; s. c. 12 Serg. & Rawle, 382; *White v. Hopkins*, 3 Watts & Serg. 99; *Lewis v. Hanchman*, 2 Barr, 416; *Commercial Bank v. Cunningham*, 24 Pick. 270, 275; *Church v. Barlow*, 9 Pick. 547, 551; *In re Babcock*, 3 Story's C. C. 393; *Sanford v. Lambert*, 2 Blackf. 137; *Clopper, Adm'r, v. Union Bank of Maryland*, 7 Har. & J. 92.

In the case of *Claremont Bank v. Wood*, 10 Vt. 582, where several, some of whom were sureties, signed a note, "each as principals," and promised to pay, it was held that, as to the holders, they were to be regarded as principals, and not as sureties; and yet the primary liability of the acceptor, and the secondary liability of the drawer, is as expressly set forth on these bills as if it were written out in full over their respective signatures. In either case, to vary their respective liabilities, as they have assumed them on the face of the bills and notes, would be to vary and control their intended operation, and, in effect, to enforce a contract which the parties never made.

On this subject, it is important to observe a material distinction between joint and several promissory notes or obligations, and bills of exchange or notes on which the parties have assumed only successive liabilities. In the former case, as between the makers and the holders, who at the time received the note with notice of the circumstances under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting its specific provisions, but as consistent with its terms; and the right of contribution arising out of that relation exists between them. 2 Am. Lead. Cas. 289, 303, in notes. But the drawer and acceptor and indorsers of a bill or note have not assumed a joint and several liability, neither are they strictly sureties, but are liable to each other in the order of their becoming parties; and when the action is on the bill or instrument, creating such successive liabilities by an indorsee for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive liabilities into a joint and several obligation, or placing them in the relation of principal and surety. The testimony clearly contradicts the express provision of the bill, and materially changes its legal effect. Unquestionably those liabilities may be changed as between the parties by an express contract to that effect, which may be enforced between them.¹ But this in no way affects the rights of a holder, who, at least, became such in ignorance of that arrangement. Under such circumstances the holder has only to look to the bill itself, and the genuineness of the signatures, to ascertain the nature and extent of the liability of the parties thereon; and they are liable to

¹ N. I. L. § 85.

him in the successive order in which their names appear upon the face of the bill. *McDonald v. Magruder*, 3 Peters, 471; *Flint v. Day*, 9 Vt. 345; *Brown v. Mott*, 7 Johns. 361.

[See Story on Prom. Notes, § 418; Story, Bills, §§ 291, 368, 432, 434; 3 Kent's Com. 104.]

As these bills were received and discounted by the plaintiffs before their maturity, without notice that they were for accommodation, we are satisfied, from the authorities, that they had a right to treat the acceptor as the principal debtor, and the drawer as liable only on his default. In such cases, there is no difference between accommodation bills and bills for value: in either case, a release of the drawer from any farther liability to the holder will have no effect, as a discharge of the acceptor from his primary liability on the bill; and this right so to treat the parties on the bill remains unaffected by any notice subsequently given that the bill was for accommodation.

It is insisted, however, that the release of the drawer will in equity discharge the acceptor, and that the principles which prevail in that court are now equally available at law. From an examination of the cases in chancery, we entertain a decided conviction that the same principles, on this subject, prevail in equity as at law. If any diversity of opinion exists in that court on this question, it has arisen more from a misapprehension of the rule at law, and a desire to conform to the principles there established, than from any rules prevailing in equity at variance with them. There is much propriety in this; for the principles regulating bills of exchange have their origin in mercantile usage, and have been adopted to meet the exigencies and wants of commercial transactions; it is therefore equally the policy of courts of equity, as of courts of law, to make the application of and enforce those principles, in relation to these securities, which experience has found necessary, to preserve their negotiability and credit.

In the case of the *Bank of Ireland v. Beresford*, 6 Dow, 233, Lord Eldon expressed his opinion of the case of *Fentum v. Pocock*, and observed that, "if it went on the principle that inquiry is not to be made into the knowledge of the party, but that all shall be taken as appearing on the face of the bill, I think it a most wholesome doctrine." The case is important only, as showing the individual opinion of Lord Eldon on that question, and as showing that no different rule had then prevailed in chancery. In the case of *Glendinning, ex parte*, 1 Buck, 517, Lord Eldon refused to adopt the principle of the decision of *Fentum v. Pocock*, and recognized the general doctrine as held in *Laxton v. Peat*. That was the case of an accommodation acceptance, and known to be such, by the holder, when he received the bill. We are, therefore, not called upon to approve or disapprove of the doctrine of that case; for in

this case the plaintiffs had no notice, when the bills were received and discounted, that they were for accommodation.

If the plaintiffs in this case had received the bills with knowledge that they were given for accommodation, we do not say but that the defence would be available; for when one takes a bill, even before maturity, with notice of a given fact, it is not unreasonable that he should be charged with the consequences that result therefrom as if the bill had been received overdue. But that principle does not apply, when the bill is taken before maturity, without notice and for value; for the bill is then held independent of all equities existing between the original parties; and Lord Eldon, in that case, nowhere intimates that the principle would have such an application. It is only to the case of an accommodation bill, and known to be such by the holder when he received the bill, that he made the application of that rule.

The case, however, which should and does exert a controlling influence in our decision of this case is that of *Harrison v. Courtauld*, 3 Barn. & Adol. 36. That case, it will be perceived, was sent from chancery by the Master of the Rolls, for the opinion of the Court of King's Bench. This circumstance alone creates the inference that, in relation to bills of exchange, on which the parties have assumed successive liabilities, the principles of equity are the same as at law, and that, if the acceptor of these bills is not discharged at law, he would not be in equity; for it would be an idle proceeding for chancery to send a case to a court of law to ascertain the principles prevailing there, unless those principles have equal application in chancery. In that case, as we have assumed in this, the bill was accepted for the accommodation of the drawer, and was indorsed for value before its maturity. In that case, as in this, the holder was ignorant at the time he received the bill that it was given for accommodation, but was afterwards informed of that fact, before the act was done which the acceptor claimed operated as his discharge. It will at once be perceived how very similar are the two cases in every important particular. On the hearing of that case, the decisions at law and in equity were considered; and all the judges — Tenterden, C. J., and Parks, Taunton, and Patterson, JJ. — certified to the Court of Chancery that the acceptor was liable on the bill the same as on a bill for value.

Whether, therefore, we apply to this case the principles prevailing in equity or at law, the result is the same. The plaintiffs having no notice at the time they received the bills that they were given for accommodation had a right to treat the drawer as collaterally liable thereon, and the acceptor as the principal and primary debtor; and this right of the holder remains unaffected by any subsequent knowledge which he may have that they were for the accommodation of the drawer. Under such circumstances, the release of the drawer

in no way affects the liability of the defendant as acceptor. This view of the case renders it unnecessary to pass upon other questions which were urged in the argument of the case.

The result is, that the judgment of the County Court must be reversed, and the case remanded.

CHAPTER XI.

HOLDER'S POSITION.

PETTEE v. PROUT.

Supreme Court of Massachusetts, September, 1855. 3 Gray, 502.

The possession of a negotiable instrument, according to the law merchant, raises a presumption that the holder is the owner, also a presumptive right, after maturity, to maintain an action thereon against remote as well as against immediate parties.

ACTION of contract on a promissory note for \$50, dated March 14, 1851, signed by the defendant, and payable in one year to the Cheshire Iron Works, or bearer, with interest. The defendant, in his answer, denied that the plaintiff was the owner and bearer of the note sued upon, and alleged that it was the property of the Cheshire Iron Works; and also filed a declaration in set-off upon the following note: "\$49.74. Cheshire, June 11, 1851. Six months after date we promise to pay to the order of Gilman Bowker, forty-nine dollars, $\frac{74}{100}$, value received, ten dollars of which is to be paid in goods, with interest. Cheshire Iron Works, by S. Pettee, General Agent."

The case was submitted to the court upon a statement of facts, in which it was agreed that the plaintiff was the general agent of the Cheshire Iron Works; that the two notes were duly executed on the days of their respective dates; that the note in set-off was assigned by the holder thereof to the defendant, for a valuable consideration, with the intention of securing a debt against the Cheshire Iron Works; that the Cheshire Iron Works was insolvent, and had no property; and that the stockholders, of whom the plaintiff was one, were individually liable for its debts.

There being no evidence to whom the note sued upon belonged, beyond the note itself, the defendant contended that the plaintiff had not proved his title to the note; and further contended that if he had, the note for \$49.74 should be allowed in set-off.

[Argument not reported.]

SHAW, C. J. The plaintiff brings his action, as bearer of a note made by the defendant to the Cheshire Iron Works, or bearer. He

therefore claims as the holder of a negotiable promissory note, payable on time, and not dishonored; and if he establishes his title by proof, he is entitled to the same privileges and immunities as an indorsee having taken a note by indorsement in the course of business, before it has become due. He is not subject to any equities as between the promisor and the original payee, nor to the set-off of any debt, legal or equitable, which the promisor may afterwards acquire. *Wheeler v. Guild*, 20 Pick. 545.¹ By giving a note payable to bearer at a future day, which is strictly a negotiable note, the defendant agreed to pay the amount to any person to whom it should be transferred, before the day of payment, without claiming to set off any demand which he then had or might have against the promisee. It is in this respect like mercantile notes (in use, we believe, in some of the States where the law allows set-offs and other equitable defences, even against indorsees of promissory notes), payable "without defalcation," thereby meaning, by force of the contract itself, to bind the maker to pay the amount absolutely to the regular holder, and renouncing any benefit of set-off or other equitable defence against the payee.

Then the question is as to the proof. Where a plaintiff brings the note declared upon in his hand, and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner; and this will stand as proof of title, until other evidence is produced to control it. Ordinarily, such bearer, relying on the general presumption, has no means of proving the transfer of the note to himself.

The defendant contends that, as the plaintiff was the general agent of the corporation to whom the note was payable, and, as such, had the custody of all their notes, his possession may have been the possession of the corporation. But we think that this fact alone is not sufficient to rebut the general presumption.

The demand relied on by the defendant is a note signed by the Cheshire Iron Works, payees of the note in suit, and payable to order; still it was not negotiable, because payable in part in goods. A negotiable note must be payable in money.² But though the defendant could not sue on this note in his own name, yet we believe by the Rev. Sta. c. 96, § 5,³ as the assignee of a *chose in action*, the holder of such a note might use it as a set-off, in a proper case, as against a suit brought by the debtor, in the same manner as if it were a legal debt. But it is unnecessary further to remark on the validity of the set-off; the ground of our decision is, that the plaintiff held the note in suit under such a title that no demand of the

¹ *Post*, p. 461.

² See *Quinby v. Merritt*, 11 Humph. 439, *ante*, p. 43; N. I. L. § 18.

³ Rev. Laws of Mass. ch. 174, § 1. Cf. as to the right of an assignee of a common-law *chose in action* to maintain an action thereon, Rev. Laws, ch. 173, § 4.

defendant, legal or equitable, against the Cheeshire Iron Works could avail him as a set-off.

Judgment for the plaintiff.

[The holder's right to recover, apart from any question of title or ownership, will depend, first, on the character of the defence set up, — if an absolute or real defence, he cannot recover.

An absolute or real defence is one which denies the existence of the contract, or that it is the contract of the defendant.]

FOSTER v. MACKINNON.

Common Pleas of England, July, 1869. L. R. 4 C. P. 704.

That the defendant signed the instrument, induced by fraudulent representations that it is a contract of a different character, is, in the absence of negligence, an absolute defence, available even against a *bona fide* holder.

ACTION by indorsee against indorser on a bill of exchange for £3000, drawn on the 6th of November, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part-payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud.

The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The cause was tried before BOVILL, C. J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange; but there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances: Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighborhood) was interested; and the defendant had some time previously, at Callow's request, signed a guaranty for £3000, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him it was a guaranty; whereupon the defendant, in the belief that he was signing a guaranty similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back of the bill, immediately after that of Cooper. Callow only showed the defendant the back of the

paper; it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

The jury returned a verdict for the defendant. Rule *nisi* for a new trial.

In the course of the argument of Sir J. D. Coleridge, Solicitor General, in favor of the rule, the following was said: [Brett, J. *Nance v. Lary* (5 Ala. 370, cited in *Parsons on Bills*, 114) seems to be very much to the purpose. In that case, the defendant and one Langford being about to execute a bond in blank, the latter produced a sheet of paper, upon which the defendant signed his name; whereupon Langford suggested that the signature was so far from the bottom of the paper that there might not be room for the bond to be written above it, and produced another sheet for the defendant to sign so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had been or would be destroyed. Subsequently, Langford caused the note upon which the present suit was brought to be written over the blank signature of the defendant retained by him, and negotiated it to the plaintiff. Collier, C. J., said: "The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who indulges in the idle habit of writing his name for mere pastime, or leaves a sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."]

The Solicitor-General then citing *Swan v. North British Australasian Co.*, 2 H. & C., at p. 184, that "honest acquisition confers title," [Byles, J. If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign.]

Cur. adv. vult.

BYLES, J. This was an action by the plaintiff as indorsee of a bill of exchange for £3000 against the defendant as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and telling the defendant that the instrument was a guaranty. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he, the defendant (as the witness stated), believing the document to be a guaranty only.

The Lord Chief Justice told the jury that, if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A rule *nisi* was obtained for a new trial: first, on the ground of misdirection in the latter part of the summing up; and, secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read,¹ has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground

¹ Cf. *Walker v. Ebert*, 29 Wis. 194.

that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In *Thoroughgood's Case*, 2 Co. Rep. 9 *b*, it was held that, if an illiterate man have a deed falsely read to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to *Thoroughgood's Case*, 2 Co. Rep. 9 *b*, in Fraser's edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor; and a case in Keilwey's Reports (Keilw. 70, pl. 6) is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities: see Com. Dig. *Fait*, B. 2; and is recognized by Bayley, B., and the Court of Exchequer, in the case of *Edwards v. Brown*, 1 C. & J. 312. Accordingly, it has recently been decided in the Exchequer Chamber that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor. *Swan v. North British Australasian Land Company*, 2 H. & C. 175.

These cases apply to deeds; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and,

if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature; then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case, the signer would not have been bound by his signature, for two reasons: first, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of *Ingham v. Primrose*, 7 C. B. N. s. 83; 28 L. J. C. P. 294, and the case of *Nance v. Lary*, 5 Ala. 370, cited 1 Parsons on Bills, 114, n., both cited by the plaintiff, the facts were very different from those of the case before us, and have but a remote bearing on the question. But, in *Putnam v. Sullivan*, an American case, reported in 4 Mass. 45,¹ and cited in Parsons on Bills of Exchange, vol. i. p. 111, n., a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to indorse a different note for a different purpose. And the court intimated an opinion that even in such a case as that, a distinction might prevail and protect the indorsee.

The distinction in the case now under consideration is a much plainer one; for, on this branch of the rule, we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We

¹ *Post*, p. 404.

abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial.

Rule absolute.

NOTE. — In *Walker v. Ebert*, 29 Wis. 194, suit was brought by a *bona fide* holder of a negotiable promissory note against the maker. The defendant offered to prove that he was a foreigner and unable to read or write the English language; and that he was induced by the payees of the note, to sign a contract which he supposed, was a contract of agency, but which, in fact was the instrument sued on. The court rejected this evidence and gave judgment for the plaintiff.

In reversing this judgment, Dixon, C. J., said: "The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii*, — begging the question altogether. . . . It must always be competent for the party proposed to be charged upon any written instrument to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts, as, by infants, married women, or insane persons; or where they are void for other cause, as, for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instruments by putting them in the form of negotiable paper."

But the question of negligence is of great importance in such cases as that of *Foster v. Mackinnon*, *supra*, for one is not to be allowed, lightly, to deny that a contract which one has signed, is really one's contract. And if a man signs a contract which he does not read, and he is not induced to refrain from so doing by the fraud of one upon whom he can reasonably be entitled to rely, he will be bound by the terms of the contract. Thus in *Chapman v. Rose*, 56 N. Y. 137, the defendant, having signed a contract of agency with one M., signed, without reading it, what he supposed was a copy of the contract, induced by the statement of M. to that effect. The instrument which he had thus signed was, however, a negotiable promissory note, of which the plaintiff was a *bona fide* holder.

In reversing a judgment for the defendant, Johnson, J., said: "There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by

which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was dealing, instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith, for value. The question which arises on the branch of the charge now under consideration is, whether it is enough, as against a *bona fide* holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no *laches* or negligence in signing the instrument. . . . It is quite plain that if the law is that no such inquiry is admissible, a serious blow will have fallen upon the negotiability of paper. It will be a premium offered to negligence. . . . To avoid such evils it is necessary, at least, to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss."

MORRIS v. BETHELL.

Court of Common Pleas of England, Michaelmas, 1869. L. R. 5 C. P. 47.

So is the forgery of the defendant's signature, unless the defendant is estopped to set up that fact.¹

ACTION against the acceptor of a bill of exchange for £400, dated 22d of July, 1868, drawn by Richard Bethell, payable three months after date, and indorsed by Bethell to the plaintiff. Plea, denial of the alleged acceptance. Issue thereon.

The facts were as follows: In May, 1867 the plaintiff discounted for Richard Bethell a bill for £300, purporting to be drawn by Richard Bethell upon the defendant and to be accepted by the latter, payable at his bankers, Coutts & Co.; which bill was at its maturity, viz., on the 5th of August, 1867, paid by Messrs. Coutts & Co., by authority of the defendant. Upon the faith of the former bill having been duly honored by the defendant, the plaintiff also discounted for Richard Bethell the bill declared on. The defendant had in June and July, 1867, before maturity, paid two other bills similarly drawn, and purporting to be accepted by him. The defendant, who was called as a witness, swore that all these acceptances were forgeries, that the acceptances were unauthorized by him, and that he did not know that the plaintiff was the holder of the bill for £300 which was paid in August, 1867. He further stated that he had paid the former bills in order to avert from his brother the consequences of his act, and upon his solemn promise that it should not be repeated. It did not appear that the plaintiff was aware of the

¹ N. L. L. § 40.

payment of the two bills in June and July, 1867, or that he made any inquiry before he took the bill in question.

On the part of the plaintiff it was contended that the defendant having paid the bill which the plaintiff held in August, 1867, admitted thereby that the acceptance was genuine, and, in the absence of notice to the plaintiff, was estopped from denying that the bill declared on was accepted by him or with his authority.

The Lord Chief Justice, though pressed by the Solicitor General,¹ on behalf of the defendant, to do so, refused to nonsuit the plaintiff; and the jury, in answer to questions left to them, found that the acceptance to the bill declared on was not the defendant's signature, nor authorized nor adopted by him; that he did not know that the plaintiff had held the former bill of August, 1867, and that he did not lead the plaintiff to believe that the acceptance to the bill in question was his signature, or was authorized by him.

A verdict was thereupon entered for the defendant; leave being reserved to the plaintiff to move to enter a verdict for him for the amount of the bill and interest, if the court should be of opinion that the Lord Chief Justice was bound to hold, as matter of law, that upon the foregoing facts the plaintiff was entitled to a verdict.

[Argument reported.]

BOVILL, C. J. At the trial the plaintiff's counsel contended that the defendant was estopped from denying that the acceptance to the bill declared on was his, the Solicitor General, on the other hand, contending that I ought to nonsuit the plaintiff. I declined to withdraw the case from the jury, because I thought there was evidence for them, though extremely slight. I now entertain some doubt whether I ought to have left the case to the jury at all. They, however, found that the acceptance in question was not the defendant's signature, nor affixed to the bill with his authority, and that the false signature was not adopted by the defendant; and they further found that the defendant did not know that the plaintiff was the holder of the £300 bill paid in August, 1867. With reference to the alleged holding out, the jury also found that the defendant did not lead the plaintiff to believe that the acceptance was his signature. If then the question was for the jury, it has been decided against the plaintiff.

Mr. Huddleston now insists that I was bound to rule, as matter of law, that upon the facts proved the plaintiff was entitled to the verdict; and that is the question which by consent was reserved by me for the court. I am of opinion that the finding of the jury disposes of the case. The only ground upon which a man can be

¹ Sir John Duke Coleridge.

held responsible as the acceptor of a bill signed by another in his name is, that he has authorized or adopted the signature, or has so conducted himself as to be estopped from disputing it. Now, what had the defendant done here? He had on a former occasion paid a bill of which the plaintiff was the holder, and which had been similarly accepted in his name without his authority; and it is contended that he thereby held out to the plaintiff that he would treat as genuine and pay all bills so accepted. There was no evidence that the defendant ever knew that the plaintiff was the holder of the former bill; and the plaintiff seems to have made no inquiry when he discounted the bill in question. If it were made to appear that there has been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of his principal, there would be evidence, and almost conclusive evidence, against the latter that the acceptance was written by his authority. That was the case of *Barber v. Gingell*, 3 Esp. 60. It would have been idle to contend there that the defendant was not responsible for the signature. The report is short; but I do not understand it to have been treated as matter of law, but rather as a conclusion of fact by the jury. Here the transaction was not one of a mercantile character; there was no business between the parties.

What then does the payment of one bill under such circumstances hold out? Is it that, as matter of law, the party binds himself to pay all further bills which may assume to bear his acceptance, whether authorized by him or not? I should be sorry to affirm any such principle; and I think no jury could safely act upon the notion of authority or adoption under such circumstances. The utmost extent of the doctrine, as it seems to me, is that it is a question for the jury. Indeed, in all the cases cited by Mr. Huddleston the question was left to the jury.¹ If the defendant had by his conduct led the plaintiff to suppose that the acceptance was his genuine signature, or was authorized by him, he might be estopped from disputing it; otherwise not. But that was especially a question for the jury. It was put to the jury, and they negatived it, and, as I think, properly negatived it. At all events there was no evidence upon which the judge would have been warranted in acting upon his own responsibility and holding that, as matter of law, the plaintiff was entitled to a verdict. The rule must therefore be refused.

WILLES, KEATING, and BRETT, JJ., concurred.

Rule refused.

¹ The following cases, and some others, were cited: *Barber v. Gingell*, *supra*; *Keane v. Rogers*, 9 Barn. & C. 577, 586; *Graves v. Key*, 3 Barn. & Ad. 313; *Pickard v. Sears*, 6 Ad. & E. 469; *Gregg v. Wells*, 10 Ad. & E. 90; *Freeman v. Cooke*, 2 Ex. 654; *Ryan v. Sams*, 12 Q. B. 460; *Cornish v. Abington*, 4 Harl. & N. 549. See Bigelow, *Estoppel*, 5th ed., pp. 558, 559.

BAYLEY v. TABER.

Supreme Court of Massachusetts, May, 1809. 5 Mass. 286.

So, commercial paper declared void by statute is void even in the hands of a *bona fide* holder for value.

THE declaration in this action contained thirty-seven counts upon as many promissory notes, alleged to have been made by the defendants, each under five dollars, payable to bearer on demand for value received, and bearing date between the third day of October and the thirtieth day of December, 1804. Plea, the general issue.

At the trial, notes comporting with the several counts were produced in evidence, all bearing the impression of plates, types, or printing. The signature of the defendants to all of them was admitted. The defendants offered to prove that some of the notes declared on were in fact made and issued by them after the first day of April, 1805, though bearing date before that day; and that the notes which had been so made were antedated by them, to avoid the operation of the Statute of 1804, c. 58, which declares notes of the like description, made or issued after that day, to be utterly void.

[Argument reported.]

PARKER, J. This cause was tried before me at the sittings after the last law term in Cumberland, in May last; and I then inclined to the opinion that the defendants should not be permitted to allege a falsity in an instrument made and signed by themselves, and which had by them been put into general circulation as money. Notes of this description, under the denomination of Taber's notes, to a large amount, having become a common currency in the district of Maine, it suddenly struck me as inconsistent with the common principles of justice, and the policy of the law, that the promisors in those notes should be allowed to avoid payment of them to an innocent holder, by alleging that they bore false dates, and by showing that in uttering them they had contravened the laws of the Commonwealth.

I therefore rejected the evidence offered; but very soon after the trial, having revolved the question in my mind at more leisure, I came to doubt of the correctness of my opinion, and intimated my desire to the counsel that the question should be reserved for the consideration of the whole court. This was done in such manner as to cause very little delay, and no inconvenience to the parties or their counsel; it having been agreed that the question should be taken up by the court at this adjourned session, and that the arguments of the counsel should be reduced to writing, and transmitted to the court.

Upon an attentive consideration of the question, and of the argu-

ments sent to us, which on both sides are concise and perspicuous, we are unanimously and clearly of opinion that the facts proposed by the defendants to be proved to the jury at the trial, constitute a good defence against the counts to which those facts are applicable, and that it is competent to the defendants in this action to set up and maintain such defence.

The Statute of 1804, c. 58, § 1, enacts that all bills, notes, cheques, drafts, or obligations whatsoever, under the amount of five dollars, payable to bearer or to order, shall be wholly in writing; and that all notes, etc., under the aforesaid amount, and payable as aforesaid, which should be made or issued after the first day of April then next, and which should bear the impression of types, plates, or printing, should be utterly void, and that no action should be thereon sustained in any court of law.

The second section of the same statute imposes a penalty upon any person who should issue or pass any of the securities described in the first section, after the said first day of April, which was April, 1805.

The same statute, c. 134, imposed an increased penalty upon any person who should, after the tenth day of the same April, issue or pass like notes, other than those of incorporated banks, for a less sum than five dollars or whereon less than five dollars should be due, with intent that the same should be circulated as currency.

The statute first cited is peremptory and unequivocal, in enacting that all notes like those declared on in this action, made or issued after the first day of April, 1805, shall be utterly void; and it prohibits the sustaining of any suit upon them in any court of law. The defendants say, and they offered to prove, that some of the notes sued in this action *were* made and issued after that day. To reject the proofs of these facts, because the defendants are the original promisors, and because the plaintiffs may be supposed to be innocent holders of the notes for valuable considerations, would be, to all intents and purposes, to defeat the operation of the statute, and would amount to a judicial repeal of an act of the legislature.

The maker of a note payable to bearer is generally the only person to be called upon for payment, it passing from hand to hand, on the credit of the promisor's name, like bank-bills, the receiver seldom requiring any guaranty from him who passes it. Now, the declared object of the legislature was entirely to prevent the circulation of such paper. But if, by giving a fictitious date to them, the maker is prevented from showing that they were made or issued after the time when they were declared by the statute to be void, they would continue to circulate, as long as there should be confidence in the ability of the makers to pay them.

However hard the operation of the statute may appear to be against persons into whose possession such notes may have come *bona fide*

and for a valuable consideration, it is a hardship created by law for the public good, and the courts of law are prohibited from granting any relief against it.

Nor is it altogether certain that the receivers of such notes are free from blame, although not privy to the actual making or antedating of them. The laws of the government are presumed to be known by all the citizens. If the notes were *in fact* made or issued after they were declared void by statute, and after a penalty was attached to the passing of them, although no penalty is expressly enacted against the receiver; yet the act of receiving was necessary to enable the offender to pass them, and in this view the receiver may be considered as having aided in the offence of passing. Nor is it improbable that the legislature contemplated the punishment of the receiver, when they took from him all power of coercing payment of such notes in the courts of law. But be this as it may, whether the plaintiffs in this action are innocent or not, to authorize them to maintain a suit, and recover judgment on notes of this description so situated, when the legislature has declared them to be utterly void, would be effectually to annul an act, the wisdom and policy of which the legislature alone had the right to determine.

Nor is it a novel doctrine that a person shall be permitted to avoid his contract by alleging his own criminality, provided it consists in the violation of some positive statute of the government. Contracts, the consideration of which is money won at play,¹ or loaned at unlawful interest, have always been subject to the same rule, not only against those who participated in the offence, but even against innocent indorsees, when they have claimed the performance of such contracts.

The case of *Lowe v. Waller*, 2 Doug. 736, shows this long to have been the law in England; and it is understood that the like principle has been uniformly adopted and practised upon by the courts in this country.

It has been suggested by the counsel for the plaintiffs in the close of their argument that, to make this a good defence, it should have been specially pleaded. But it is not necessary; for in *assumpsit*, everything which destroys the right of action may be given in evidence under the general issue.

Indeed, there seems to be no room to doubt upon this question; and nothing but a reluctance to permit a man to avail himself of a falsity in circulating these notes, and afterwards to avoid payment by showing the truth, could have caused a hesitation at the trial.

The verdict must be set aside, and a

New trial granted.

¹ But see Rev. Laws of Mass., ch. 99, § 3, that notes, bills, etc., the consideration of which is money won by gaming, shall be void between the parties thereto and as to all persons, *except* those who hold them in good faith, without notice of the illegality.

[If no absolute defence is set up, the holder's right to recover will depend upon the question, whether he is a *bona fide* holder.

A *bona fide* holder is one who has taken the instrument for value, in good faith and before maturity.¹]

BAY v. CODDINGTON.

Court of Chancery of New York, January, 1821. 5 Johns. Ch. 54.

By the law merchant, a pre-existing debt is a valuable consideration for the transfer of a negotiable instrument.² In some jurisdictions, if the instrument is transferred as security for such antecedent debt, it is deemed not to be given for value.³

THE plaintiff being owner of a vessel, employed Randolph & Savage, defendants, who were carpenters, to sell her on a credit, and take good notes in payment, and transmit the same to him, with an account of their charges, which he would pay. R. and S. sold the vessel for \$3875, and, on the 3d of June, 1819, received the notes of the purchasers, payable in two, three, and four months, some of them being made payable to, and indorsed by, P. Aymar & Co., and the others by J. R. Stewart. On the 12th of June, 1819, R. and S. delivered the notes so indorsed to the defendants, J. and C. Coddington, who were at that time, as they stated in their answer, under heavy responsibilities for R. and S., as indorsers of notes for their accommodation, payable at different times, but all subsequent to the 12th of June, 1819, which they were afterwards obliged to take up as they fell due, amounting to \$17,000. The answers admitted that R. and S. had stopped payment, when the notes so held by them were to be delivered to J. and C. Coddington.

The defendants, J. and C. Coddington, denied all knowledge of the manner in which the notes had come to the hands of R. and S., and alleged that they believed that they were the *bona fide* and exclusive property of R. and S.; that they received these notes, with others, as a guaranty and indemnity, as far as they would avail, for their responsibilities; and, three days after, disposed of some of the notes for cash, and did not know, until several days afterwards, that the notes belonged to the plaintiffs, as stated in the bill. They admitted that, when they so received the notes, R. and S. were not, in a strict legal sense, indebted to them; but that they were under large gratuitous responsibilities for them.

No proofs were taken, and the cause came on to be heard on the pleadings only.

[Argument reported.]

KENT, Chancellor. It is admitted that Randolph & Savage held the notes belonging to the plaintiff, which they transferred to the

¹ N. I. L. § 69.

² Id. § 42.

³ See Bigelow, Bills and Notes, ch. xvii. § 2.

defendants, J. and C. Coddington, on the 12th of June, 1819, as agents or trustees for the plaintiff, and that they had no authority to pass them away. It was a gross and fraudulent abuse of trust, on the part of R. and S. The only question now is, whether J. and C. C. are entitled, under the circumstances disclosed, to hold the notes, and retain the amount of them as against the plaintiff.

Negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But the defendants, J. and C. C., have not entitled themselves to the protection of holders of that description. The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created or responsibility incurred, on the strength and credit of the notes. They were received from R. and S., and after they had stopped payment, and had become insolvent within the knowledge of J. and C. C., and were seized upon by the Coddingtons, as *tabula in naufragio*, to secure themselves against contingent engagements, previously made for R. and S., and on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration, within the meaning or within the policy of the law.

In *Miller v. Race*, 1 Burr. 452, a bank-note was stolen, and came to the hands of the plaintiff, and he was held entitled to it. But the Court of King's Bench considered bank-notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note for a full and valuable consideration, by giving money in exchange for it, in the usual course of his business, and without notice of the robbery, and on those considerations he was entitled to the amount of the note. So, in *Grant v. Vaughan*, 3 Burr. 1516, 1 W. Black. 785, a bill of exchange, payable to bearer, was lost, and the finder paid it to a grocer for teas, and took the change. There the court laid stress on the facts that the holder came by the bill *bona fide*, and in the course of trade, and for a full and fair consideration, and that, though he and the real owner were equally innocent, yet he was to be preferred, for the sake of commerce and confidence in negotiable paper. Again, in *Peacock v. Rhodes*, 1 Doug. 633, a bill of exchange, with a blank indorsement, was stolen and negotiated to a person who took it in the way of his trade, for cloth sold and cash for the balance, and he was held entitled to hold it. Lord Mansfield placed reliance on the circumstance that it was received in the course of trade. It was "by reason of the course of trade, which creates a property in the assignee or bearer," that Holt, C. J., 1 Salk. 126, Anon., held, that the owner of a bank-bill,

which was lost and transferred by the finder to C. for a valuable consideration, could not maintain an action against C. It will not be necessary to go further in support of the principle which uniformly pervades the cases upon this point, and I shall conclude with the case of *Collins v. Martin*, 1 Bos. & Pul. 648, in which it was decided that, if bills of exchange, indorsed in blank, be deposited with a banker, to be received when due, and the banker raises money on them by pledging them to C., and then becomes bankrupt, C. could not be sued by the real owner, as he took them innocently, without knowledge of the previous circumstances. But it is to be observed that C. there advanced money to the banker, on the credit of the bills; and, as Eyre, C. J., observed in that case: "If it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and affected by all that will affect him."

In short, I have not been able to discover a case in which the holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title, in law or equity, as the true owner, unless he received it not only without notice, but in the course of business, and for a fair and valuable consideration given or allowed on his part, on the strength of that identical paper. It is the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it.

I shall accordingly declare, that the defendants, J. and C. Codrington, are not entitled to the notes or the proceeds thereof, as against the plaintiff, who was the lawful owner of them when they were transferred to those defendants, inasmuch as they did not receive the notes in the course of business, nor in payment, in whole or in part, of any then existing debt, nor for cash or property advanced or debt created or responsibility incurred on the credit of the notes. And I shall direct that it be referred to a master to compute the amount of the said notes, with interest thereon from the times they were respectively payable, to the time of making the report; and that all the defendants in the amended bill, or some or one of them, pay to the plaintiff the sum that shall be reported as the amount of the said notes, with interest, as aforesaid, within thirty days after the master shall have made and filed his report, and notice thereof, and of this decree, or that the plaintiff may have execution therefor, against all or either of the said defendants, according to the course and practice of the court.

And it is further ordered, that the defendants, R. and S., pay to the plaintiff his entire costs of this suit, to be taxed, including the costs of the original bill, and that the plaintiff give credit upon the

costs so to be taxed, the charges and commissions due from him to the said defendants, R. and S., upon the sale of the vessel in the pleadings mentioned, and amounting to \$96.87; and that he have execution for the balance of costs, after such deduction, against them, the said R. and S., according to the course and practice of the court. And it is further ordered that no costs be taxed or allowed to the plaintiff, or to the defendants, J. and C. C., as against each other.

*Decree accordingly.*¹

SUTHERLAND v. MEAD.

Supreme Court of New York, Appellate Division, February, 1903. 80 App. Div. 103; 80 N. Y. Supp. 504.

And in New York, it has been held that such is the rule under the Statute.²

THE case is stated in the opinion.

[Argument not reported.]

HATCH, J. This action was brought to recover upon a promissory note made by the defendant Deshong, upon which the appellants were accommodation indorsers. It appeared upon the hearing of the motion that the defendant Palleke was indebted to the appellants upon a promissory note for the sum of \$1000; that as such note was about falling due and on the 15th of April, 1902, Palleke requested the appellants to accept in payment of such note the promissory note executed by Deshong, set forth in the complaint in the action; that they refused so to accept the same unless Palleke could procure it to be discounted and would deliver the proceeds thereof to the appellants, and for such purpose the appellants indorsed said note in their firm name, and the defendant Palleke took the same and agreed to return the proceeds thereof to the appellants. Instead of discounting the note Palleke transferred the same to the plaintiff in the action who paid thereon the sum of \$150 cash, and as further consideration took and held the same as collateral security for an indebtedness then due and owing by Palleke to the plaintiff in a sum exceeding \$3000, the whole of which still remains due and unpaid.

This action was brought by the plaintiff to enforce the note; all of the defendants made default in answering. Judgment was thereupon entered by the plaintiff for the full amount secured to be paid by the note, with interest. Thereafter the accommodation indorsers, the appellants herein, made a motion to open the default and for leave to serve an answer. . . . [Motion to open default considered,

¹ This case was affirmed in the Court of Errors, in 1822, 20 Johns. 637.

² N. I. L. § 42.

and ruling of lower court denying the motion held correct.] Thereupon, without obtaining leave so to do, the appellants made a motion to set aside the judgment or in the alternative to modify the same by reducing the recovery upon the note in suit to the sum of \$150, with interest thereon from the day of its date. This motion was based upon the facts and circumstances connected with the delivery of the note to Palleke, as has been previously stated, and also upon an affidavit made by the plaintiff in the action that he had only paid to Palleke for the note \$150 in cash and held the same as collateral security for the payment of a pre-existing debt. It was made to appear by the moving papers that the appellants herein were ignorant of the consideration paid by the plaintiff for the note prior to the time when the application was made to open the default when the affidavit was read. Upon learning these facts the appellants caused an answer to be prepared, setting up the facts and circumstances connected with the delivery of the note, the indorsement by the appellants, the fraudulent diversion of the same by Palleke, and the consideration paid therefor by the plaintiff. This motion upon these papers coming on to be heard was denied, and from the order entered thereon this appeal is taken.

The present facts were wholly unknown to the appellants at the time when the motion was made. . . . The present motion is . . . to set aside the judgment based upon a state of facts, showing that the plaintiff was only entitled to enforce the payment of the note to the extent to which he had parted with value therefor, and upon the conceded facts he was not entitled to the judgment which had been entered, unless entitled to enforce the note for the full amount. . . .

It is said, however, that the Negotiable Instruments Law has changed the rule in respect to what constitutes consideration for a promissory note, it being claimed that a pre-existing indebtedness is a good consideration and renders the holder thereof a holder for value of a note taken as security therefor, as against accommodation indorsers, even though the note has been fraudulently diverted from the purpose for which it was given, and the indorsers have received no value. Since 1822, when *Coddington v. Bay*, 20 Johns. 637, was decided, it has been the settled law of this State that accommodation makers or indorsers of negotiable paper were not liable to a holder thereof where the same had been fraudulently diverted from the purpose for which it was made or the indorsement given and the holder had received it solely as collateral security for an antecedent debt. *Comstock v. Hier*, 73 N. Y. 269. In other words, the surety has the right to impose such liability upon his obligation as he sees fit, and he is not to be made liable outside the terms of his engagement in the case of negotiable paper except for the benefit of a *bona fide* holder who parted with value and was misled to his prejudice.

United States Nat. Bank v. Ewing, 131 N. Y. 506. Whatever may have been the rule with respect to this question in other jurisdictions, it has been the law of this State, uniformly enforced during this period of time, and still is the law unless the Negotiable Instruments Law (Laws of 1897, chap. 612) has changed the same. Section 51¹ of such act provides: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Standing alone, this provision has not changed the existing law. It was always the law of this State that a consideration sufficient to support a simple contract constituted a good consideration for the instrument. This declaration, therefore, upon this subject added nothing whatever to the law as it existed and had existed from time immemorial. So, also, an antecedent or pre-existing debt constituted value and was sufficient in consideration of an instrument, either negotiable or otherwise, as between the parties thereto. Moreover, it was always the law that the actual payment and discharge of a pre-existing debt constituted the same a valuable consideration for the transfer of commercial paper and shut off prior equities existing against it. Such was the rule announced in *Coddington v. Bay*, *supra*, and has since been enforced by the courts of this State. *Mayer v. Heidelberg*, 123 N. Y. 332; *Spring Brook Chemical Co. v. Dunn*, 39 App. Div. 130; *Blair v. Hagemeyer*, 26 App. Div. 219. There is nothing contained in this enactment, therefore, which has changed the rule of law respecting the consideration of commercial paper as it had previously existed, and the language of the statute is quite insufficient to annul the rule which has obtained with respect to the fraudulent diversion of commercial paper as against accommodation indorsers thereon. Such rule, therefore, cannot be considered as changed unless it be by virtue of the other provisions of the statute showing that such defence is cut off and indicating a clear intent to change the rule.

Section 52² of the Negotiable Instruments Law defines what constitutes a holder for value: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." And by section 55³ (as amd. by Laws of 1898, chap. 336) an accommodation party is made liable on the instrument to a holder for value, although such holder at the time of taking the instrument knew him to be only an accommodation party. Section 91⁴ defines a holder in due course to be a person who has taken the instrument under the following conditions: "1. That it is complete and regular upon its face; 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

¹ N. I. L. § 42.

² Id. § 46.

³ Id. § 43.

⁴ Id. § 69.

3. That he took it in good faith and for value; 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Section 94¹ defines when the title is defective in the person who has negotiated the instrument, as follows: "When he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Section 95² provides that the holder must have "actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith." By section 96³ the rights of a holder in due course are defined to be: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." By section 98⁴ it is provided: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

It is evident from these provisions that the Legislature did not intend to wipe out the defences to a promissory note where the same had been procured from the maker by fraud, or where the indorsement had been given for a specific purpose, and a fraudulent diversion of the paper had been had. If the holder took the same with notice of such facts or circumstances as charged him with notice, or if he parted with no value, it constitutes a good defence to such note. As the definition of value for a promissory note has not added anything to the law upon that subject beyond such as was previously recognized, we ought not to conclude that the Legislature intended to change the rule with respect thereto, nor to permit frauds to be perpetrated thereunder. When the Legislature defines a defective title it states in express terms that a fraudulent diversion is such. All of these sections can be harmonized in their entirety without any subtle refinement of reasoning by construing section 51⁵ to mean that to constitute an antecedent or pre-existing debt a valuable consideration in support of a promissory note, that had been fraudulently diverted, as valid in the hands of a *bona fide* holder, the latter must have cancelled, and in legal effect paid and discharged, the antecedent or pre-existing debt. By still holding the debt he in fact parts with no value. It was not intended thereby that, where a debt continued to remain in existence and enforceable as such, and the note is taken as collateral security for its payment, such debt undischarged consti-

¹ N. I. L. § 72.⁴ Id. § 76.² Id. § 73.⁵ Id. § 42.³ Id. § 74.

tutes a valuable consideration, or the holder of the note one in due course as against the accommodation maker or indorser, who has been defrauded by the negotiation of the instrument. We are not to impute to the Legislature an intent to change a rule of law which has existed in uniform course of enforcement for over three-quarters of a century without a clear and unequivocal expression so to do. The rules of law which have been laid down in England covering such question, or the reasons assigned for a different rule in other jurisdictions in this country, do not furnish controlling reasons for changing the law of this State so as to bring it into harmony with such views, in face of the fact that in the commercial centre of this country these rules have been applied for this length of time without damage to business interests or harm to commercial usages, and during its operation a period of commercial activity and prosperity has existed heretofore unknown in the world's history. We may take judicial notice that the commission appointed to revise and codify the statutes was created in the main to codify existing laws and not make new rules;¹ and certainly it was never intended that settled usages in respect of commercial paper, founded upon decisions covering a period of eighty years and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such a body. The harmony of these provisions of the statute is in no measure disturbed by a construction which causes them to read that an antecedent and pre-existing debt must be paid and discharged in order to constitute the holder of commercial paper, which has been fraudulently diverted, a *bona fide* holder, and, as such, capable of enforcing the same as against the accommodation maker or indorser. Merely taking such paper as collateral security for the payment of a pre-existing or antecedent debt does not constitute such debt value within the meaning of this statute. This matter does not seem to have been the subject of discussion beyond that had at Special Term in the case of *Brewster v. Shrader*, 26 Misc. Rep. 480, where a different rule was laid down. The authority cited therefor in the opinion is contained in the reviser's note by the author of the law. See *Crawf. Neg. Inst. Law*, 30, in which it is stated that section 51² was designed to change the rule in *Coddington v. Bay*, *supra*, and the opinion of the late James W. Eaton, Esq., instructor upon the law of Bills and Notes in the Albany Law School, wherein he says in his published edition of the *Negotiable Instruments Law*, Eaton & Greene, *Neg. Inst. Law*, 43, in referring to section 51: "It is to be inferred that the above statute extends the New York rule to include instruments given merely as collateral security." We are not disposed to adopt this construction of the law. Settled principles ought not to be over-

¹ Cf. language of Lord Herschell in *Bank of England v. Vagliano Brothers*, 1891, A. C. 145, as to the construction of the Bills of Exchange Act.

² N. I. L. § 42.

turned by imputing a legislative intent where the language upon which it is based is equivocal in expression and when the language used which it is claimed changes the rule may be naturally harmonized with the decisions of the courts which have settled the law plainly and conclusively, and with respect to which commercial dealings have been governed in this State for over eighty years. But even though we should be wrong in our construction of this statute, nevertheless it does not change the rule of law to be applied in the particular case. As we have seen, by section 98,¹ above quoted, the burden is placed upon the holder of every promissory note fraudulently diverted to show that he, or some person under whom he claims, acquired title thereto as a holder in due course. Nothing which appears in these papers tends to controvert the fact that the note in question was fraudulently diverted. The proof upon such subject, submitted in the moving papers, is clear and unequivocal. The answer sets it up as a defence. Before the plaintiff, therefore, could recover, he must show that he or some person under whom he claims acquired the paper in due course and without knowledge of any infirmity attending upon it. Under the pleadings an issue of fact upon this question may be presented and these appellants are not to be made to suffer through the fraud that has been perpetrated upon them if the plaintiff had notice of such fact, and the appellants ought to have an opportunity to be heard upon this subject.

The doctrine of estoppel based upon the certificate executed by the appellants and delivered to the plaintiff that the note was a genuine business note given for value received; that there was no defence to the same, either in law or in equity, does not estop the appellants from interposing the defence of fraudulent diversion. The certificate was in harmony with the facts. It was genuine business paper executed for a particular purpose, and in the hands of a holder in due course may be enforced. In order to constitute an estoppel *in pais*, it must appear that the act which concludes the party was expressly designed to influence the conduct of another, and did so influence him, and when a denial of the act will operate to the injury of the holder. *Payne v. Burnham*, 62 N. Y. 69. Such is the doctrine of the cases cited by the respondent. They are without application in the present case for the reason that the certificate can add nothing to the rights of the present holder of the note. If the note had been delivered to him without consideration he could not have enforced it against these accommodation indorsers, as he would not have been misled or injured by the certificate which was given. To the extent that he parted with value he is entitled to enforce the note, with or without the certificate. In holding it as collateral security for the payment of his pre-existing debt the certificate in nowise prejudices

¹ N. L. L. § 76.

him as he has suffered nothing thereby and parted with no value on account thereof.

If these views be correct, it follows that the order should be reversed, and the judgment set aside upon payment of costs and disbursements of the action and \$10 costs of the motion to the respondent, and defendants allowed to answer. As the defendants, appellants, however, admit liability to the extent of \$150 interest and costs, the plaintiff in the action may, if he so elects, stipulate to reduce the judgment to such amount, in which event the judgment to that extent should be permitted to stand and be enforced. Ten dollars costs and disbursements of this appeal to the appellants.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM, and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements.

SWIFT v. TYSON.

Supreme Court of the United States, January, 1842. 16 Peters, 1.

In other jurisdictions, no such exception is recognized, and a pre-existing debt is deemed value, whether the instrument be transferred in payment of, or as security for such debt.

THE case is stated in the opinion of the court.

[Argument not reported.]

STORY, J. This cause comes before us from the Circuit Court of the Southern District of New York, upon a certificate of division of the judges of that court.

The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange, dated at Portland, Maine, on the first day of May, 1836, for the sum of \$1540.30, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity.

At the trial, the acceptance and indorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note, due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a

bona fide holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary further to state them. The defendant then offered to prove that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the State of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice; for the law will presume that in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the *prima facie* title to the plaintiff.

In the present case, the plaintiff is a *bona fide* holder, without notice, for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say under

the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, *Warren v. Lynch*, 5 Johns. 239, the Supreme Court of New York appear to have held that a pre-existing debt was a sufficient consideration to entitle a *bona fide* holder without notice to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent, in *Bay v. Coddington*, 5 Johns. Ch. 54.¹ Upon that occasion, he said that negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes, thus directly affirming that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries. 3 Kent, Com. § 44, p. 81. The decision in the case of *Bay v. Coddington* was afterwards affirmed in the Court of Errors, 20 Johns. 637, and the general reasoning of the Chancellor was fully sustained. There were, indeed, peculiar circumstances in that case, which the court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the notes was under suspicious circumstances, the transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration, sufficient to protect the holders, and others

¹ *Ante*, p. 372.

again insisting that a pre-existent debt was not sufficient. From that period, however, for a series of years, it seems to have been held, by the Supreme Court of the State, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties, in favor of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially *Rosa v. Brotherson*, 10 Wend. 85, *The Ontario Bank v. Worthington*, 12 Wend. 593, and *Payne v. Cutler*, 13 Wend. 605, are directly in point. But the more recent cases, *The Bank of Salina v. Babcock*, 21 Wend. 499, and *The Bank of Sandusky v. Scoville*, 24 Wend. 115, have greatly shaken, if they have not entirely overthrown, those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain that the Court of Errors have not pronounced any positive opinion upon it.¹

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases,

¹ But see *Bigelow, Bills and Notes*, 244. The principle of *Bay v. Coddington* was affirmed in the case of *Stalker v. M'Donald*, 6 Hill, 93, 1843, in which the New York court declined to follow the rule of *Swift v. Tyson*; and see *Sutherland v. Mead*, *ante*, p. 375.

which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world. "*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration, in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say that receiving it in payment of, or as security for a pre-existing debt, is

according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But to establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this court, and it has been uniformly held that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The cases of *Coolidge v. Payson*, 2 Wheat. 66, 70, 73, and *Townsley v. Sumrall*, 2 Pet. 170, 182, are directly in point.

In England, the same doctrine has been uniformly acted upon. As long ago as the case of *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1663, the very point was made, and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion, Lord Mansfield, likening the case to that of a letter of credit, said that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole court held the plaintiff entitled to recover. From that period downward, there is not a single case

to be found in England, in which it has ever been held by the court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental dicta have been sometimes relied on to establish the contrary, such as the dictum of Lord Chief Justice Abbott in *Smith v. De Witts*, 6 Dowl. & Ryl. 120, and *De la Chaumette v. The Bank of England*, 9 Barn. & Cress. 208, where, however, the decision turned upon very different considerations.

Mr. Justice Bayley, in his valuable work on Bills of Exchange and Promissory Notes, lays down the rule in the most general terms, . . . Bayley, Bills, pp. 499, 500, 5th London edition, 1830. It is observable that he here uses the words "valid consideration," obviously intending to make the distinction, that it is not intended to apply solely to cases where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go further, and establish that a transfer as security for past and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of *Bosanquet v. Dudman*, 1 Stark. 1, it was held by Lord Ellenborough, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's *bona fide*, he is to be considered as holding for value; and it makes no difference, though he hold other collateral securities more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in *Ex parte Bloxham*, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of *Heywood v. Watson*, 4 Bing. 496, and *Bramah v. Roberts*, 1 Bing. N. C. 469, and *Percival v. Frampton*, 2 Crompt. & Rose. 180, are to the same effect. They directly establish that a *bona fide* holder taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions which our researches have enabled us to ascertain to have been made in the English courts upon this subject.

In the American courts, as far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail. In *Brush v. Scribner*, 11 Conn. 388, the Supreme Court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a *bona fide* holder against all the antecedent parties to a negotiable note. There is no reason to doubt that the same rule has been adopted and constantly adhered to in Massachusetts;¹ and certainly there is no trace to be found to the contrary.

¹ See *Stoddard v. Kimball*, 6 Cush. 469; *Fisher v. Fisher*, 98 Mass. 303.

In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial States, it may fairly be presumed that whatever constitutes a valid and valuable consideration in other cases of contract, to support titles of the most solemn nature, is held, *a fortiori*, to be sufficient in cases of negotiable instruments, as indispensable to the security of holders and the facility and safety of their circulation. Be this as it may, we entertain no doubt that a *bona fide* holder for a pre-existing debt of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

GILL v. CUBITT.

King's Bench of England, Michaelmas, 1824. 3 B. & C. 466.

The rule formerly prevailed that the purchaser of negotiable paper was charged with notice of defects, if he bought it under such circumstances as to put an ordinarily prudent man on inquiry.

DECLARATION by the plaintiff, as indorsee of a bill of exchange, bearing date of the 19th of August, 1823, drawn by one R. Evered, and accepted by the defendants. Plea, general issue. At the trial before ABBOTT, C. J., at the London sittings after Hilary Term, 1824, the plaintiff proved the handwriting of the acceptors and indorser. The defendant then proved, that on the 20th of August a letter containing the bill in question and two others, was enclosed in a parcel and delivered at the Green Man and Still coach office, and booked for Birmingham. The parcel arrived at Birmingham by the coach, but the letter containing the bills had been opened, and the bills taken out of it. On the following day, the drawer advertised the loss of the bills in two newspapers. The plaintiff, who was a bill broker in London, then proved by his nephew, who assisted him in his business, that the bill was brought to his office between the hours of nine and ten on the morning of the 21st of August, by a person having a respectable appearance, and whose features were familiar to the witness, but whose name was unknown to him. He desired that the bill might be discounted for him, but the witness at first declined so to do, because the acceptors were not known to him. The person who brought the bill then said, that a few days before he had brought other bills to the office, and that if inquiry

was made, it would be found that the parties whose names were on this bill were highly respectable. He then quitted the office and left the bill, and upon inquiry the witness was satisfied with the names of the acceptors. The stranger returned after a lapse of two hours and indorsed the bill in the name of Charles Taylor, and received the full value for it, the usual discount and a commission of two shillings being deducted. The witness did not inquire the name of the person who brought the bill, or his address, or whether he brought it on his own account or otherwise, or how he came by the bill. It was the practice in the plaintiff's office not to make any inquiries about the drawer or other parties to a bill, provided the acceptor was good. Upon this evidence the Lord Chief Justice told the jury, that there were two questions for their consideration: first, whether the plaintiff had given value for the bill, of which there could be no doubt; and, secondly, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought that he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant. Then the Lord Chief Justice, after stating the evidence and commenting upon the practice in the plaintiff's office of discounting bills for any persons whose features were known to him, but whose names and abode were unknown, without asking any questions, asked the jury what they would think if a board were affixed over an office with this notice, "Bills discounted for persons whose features are known and no questions asked." The jury having found a verdict for the defendants, a rule *nisi* for a new trial was obtained in Easter term last, upon the ground that the plaintiff having paid a valuable consideration for the bill, was entitled to recover its value; and, secondly, that the case had been put too strongly to the jury, when it was compared to the case of a public notice given by a broker that he would discount all bills without asking questions.

[Argument reported.]

ABBOTT, C. J. If we thought that, upon reconsideration of the evidence, another jury ought to come to a different conclusion, we would send the case down to another trial. But being of opinion, that the proper conclusion has been drawn from the evidence, we think that this rule ought to be discharged. I agree with the counsel for the plaintiff, that this case is hardly distinguishable from *Lawson v. Weston*, 4 Esp. 56. If there is any distinction it is, that in this case the plaintiff's clerk said it was not usual with the plaintiff to ask any questions, or to make any inquiry if the bills were brought to them by persons whose features they supposed themselves to be acquainted with, provided they were satisfied with the names of the

acceptors. I cannot help thinking that if Lord Kenyon had anticipated the consequences which have followed from the rule laid down by him in *Lawson v. Weston*, he would have paused before he pronounced that decision. Since the decision of that case, the practice of robbing stage-coaches and other conveyances of securities of this kind has been very considerable. I cannot forbear thinking, that that practice has received encouragement by the rule laid down in *Lawson v. Weston*, by which a facility has been given to the disposal of stolen property of this description. I should be sorry if I were to say anything, sitting in the seat of judgment, that either might have the effect, or reasonably be supposed to have the effect of impeding the commerce of the country by preventing the due and easy circulation of paper. But I am decidedly of opinion, that no injury will be done to the interests of commerce, by a decision that the plaintiff cannot recover in this action. It appears to me to be for the interest of commerce, that no person should take a security of this kind from another without using reasonable caution. If he take such security from a person whom he knows, and whom he can find out, no complaint can be made of him. In that case he has done all any person could do. But if it is to be laid down as the law of the land, that a person may take a security of this kind from a man of whom he knows nothing, and of whom he makes no inquiry at all, it appears to me that such a decision would be more injurious to commerce than convenient for it, by reason of the encouragement it would afford to the purloining, stealing, and defrauding persons of securities of this sort. The interest of commerce requires that *bona fide* and real holders of bills, known to be such by those with whom they are dealing, should have no difficulties thrown in their way in parting with them. But it is not for the interest of commerce that any individual should be enabled to dispose of bills or notes without being subject to inquiry. I think the sooner it is known that the case of *Lawson v. Weston* is doubted, at least by this court, the better. I wish doubts had been cast on that case at an earlier time. If that had been done, this plaintiff probably would not have suffered. Coming to the facts of this case, they are these, that the young man, acting according to the course which the plaintiff when he was present followed, gave money for this bill to a person of whom, though he supposed he knew him, he really knew nothing. This is done at a very early hour, between nine and ten in the morning on the day after the bill was lost. I cannot help saying that that practice, in the plaintiff's business of a bill broker, is a practice inconvenient for the reasons I have already given. It seems to me, that it is a great encouragement to fraud, and it is the duty of the court to lay down such rules as will tend to prevent fraud and robbery, and not give encouragement to them. For these reasons, notwithstanding all the unfeigned reverence I feel for everything

that fell from Lord Kenyon, by whom *Lawson v. Weston* was decided, I cannot think the view taken by that learned lord at that time was a correct one; and that being so, I am of opinion that this rule ought to be discharged.

BAYLEY and HOLROYD, JJ., delivered concurring opinions.

Rule discharged.

GOODMAN v. HARVEY.

King's Bench of England, Easter, 1836. 4 Ad. & E. 870.

That rule was overturned, however, being deemed not the rule of the law merchant; and it is now generally held that even gross negligence by the transferee in the purchase of a negotiable instrument will not disentitle him to claim as a *bona fide* holder; notice or knowledge of facts sufficient to put a prudent man on inquiry, in the common-law sense, is not, of itself, bad faith.¹

ASSUMPSIT on a bill of exchange drawn by the defendants, payable to the order of John Scott, indorsed by Scott, and, later, by David Levy to the plaintiff. The first count alleged non-acceptance, the second, non-payment. Plea, *non assumpsit*.

The bill was given by the defendants, merchants at Limerick, to Scott, for a balance of freight. Scott put the bill into the hands of one Hudson to procure a discount of it for him (Scott), and Hudson handed it to Levy for the same purpose. The drawees refused acceptance in consequence of receiving from the defendants a notice warning them not to pay any money to Scott, as the party giving notice was about forthwith to sue out a commission of bankrupt against him.² The bill was noted for non-acceptance, and protested. No notice of the non-acceptance was given to the defendants. Levy now returned the bill to Hudson, who gave it back to Scott. Scott soon afterwards gave it to Hudson again to obtain a discount of it. Hudson now placed the bill as before in the hands of Levy, who, before maturity, but in fraud of Scott, indorsed and procured it to be discounted by the plaintiff. Levy retained the proceeds, and had never given value for the bill.

When the bill became due the plaintiff presented it for payment, and payment was refused. The drawees had funds, but the right to the proceeds was contested. The funds were furnished a day or two before; at the time of non-acceptance the drawees had no funds. The bill was protested for non-payment, and notice sent to the defendants.

It was objected for the defendants that the plaintiff, in taking

¹ N. I. L. § 73.

² The commission afterwards issued, and this action, it was understood, was defended by Scott's assignees.

the bill from Levy with the notarial marks upon it, had been guilty of gross negligence, and therefore took the bill with all its vices, and so could have no better right to recover upon it than Levy himself, who clearly would have had none. The Lord Chief Justice [Denman] was of the same opinion, observing that the plaintiff had received the bill with a death-wound apparent on it. The jury, in answer to a question from the Lord Chief Justice, said that, in their opinion, the notary's marks on the bill were sufficient notice to an indorsee of non-acceptance.

A nonsuit was then taken; and in the next term motion for a new trial was made, on the ground that the ruling against the plaintiff was wrong; that the bill had been lawfully sent into the market by Scott while not yet due; and that the plaintiff, who had taken it before maturity and had given value for it, had a right to recover the amount, notwithstanding any defect in the title of an intermediate party. A rule *nisi* was granted; in the argument of which it was urged, and conceded by the court, that the defendants were not entitled to notice of the non-acceptance.

[Argument reported.]

LORD DENMAN, C. J. The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in perfect good faith. The rule must be absolute.

LITLEDALE PATTESON and COLERIDGE, JJ., concurred.

Rule absolute.

NOTE. — The plaintiff took the bill with notice, in the notarial marks, that acceptance had been refused; but the defendants were not entitled to notice of dishonor, and the notarial marks did not necessarily suggest that the *defendants* had any other defence to the bill than want of notice. It was only a case in which the marks might have put a more careful man upon inquiry; an inquiry which might have led to a discovery of the fraud on Scott, thus bringing to light the defence.

The contrary doctrine of constructive notice from knowledge of facts which would put a man of ordinary prudence on inquiry, was first laid down in *Gill v. Cubitt*, 8 B. & C. 466, *ante*, p. 388, overturning the prior law in England.

Excepting the single case of taking in bad faith, — that is, where, in case of an equity, the taker *suspects* an equity, but will not inquire, — the decision in *Goodman v. Harvey*, *supra*, leaves nothing of the doctrine of con-

structive notice by putting upon inquiry. One is not put upon inquiry unless one in fact suspects. That is the rule in England, and the more general rule in this country. But a few of our courts adhere to the doctrine of constructive notice to the full, and fix upon the purchaser the disability of notice wherever a prudent man would inquire. Bigelow, Bills and Notes, 235-238.

DRESSER v. MISSOURI, ETC. CONSTRUCTION COMPANY.

Supreme Court of the United States, October, 1876. 93 U. S. 92.

Whether the transferee is a holder in good faith is to be determined as of the time of indorsement and payment of the consideration. If part only of the consideration is paid at the time of indorsement, and the transferee receives notice of a defect before paying the balance, he will be deemed a *bona fide* holder to the extent only of the amount paid before receiving notice.¹

THE case is stated in the opinion.

[Argument not reported.]

Mr. Justice HUNT. This action is brought upon three several promissory notes made by the Missouri and Iowa Railway Construction Company, dated November 1, 1872, payable at two, three, and four months, to the order of William Irwin, for the aggregate amount of \$10,000.

The defence is made that they were obtained by his fraudulent representations.

But a single point requires discussion. Conceding that the present plaintiff received the notes before maturity, and that his holding is *bona fide*, the question is as to the amount of his recovery.

Under the ruling of the court he recovered \$500. His contestation is, that he is entitled to recover the face of the note, with interest.

After the evidence was concluded, the plaintiff asked the court to charge the jury, that if they believed, from the evidence, that the plaintiff purchased the notes in controversy of William Irwin for a valuable consideration, on the 1st of November, 1872, and paid \$500, part of the consideration, on 21st of January, 1873, before any notice of any fraud in the contract, he was entitled to recover the whole amount of the notes; and the court refused this instruction. But the court charged the jury, —

“That, in the first place, the jury must find that there was fraud in the inception of the notes as alleged; and that if the defendants failed to satisfy the jury of that fact, the whole defence fails.

That if the fact of fraud be established, and the jury find from

¹ N. I. L. § 71.

the evidence that the plaintiff paid \$500 upon the notes without notice of the fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only *pro tanto*; that is, to the amount paid before he received notice."

It does not appear that, upon the purchase of the notes in suit, the plaintiff gave his note or other obligation which might by its transfer subject him to liability. His agreement seems to have been an oral one merely, — to pay the amount agreed upon, as should be required; and he had paid \$500, and no more, when notice of the fraud was brought home to him.

The argument of the plaintiff in error is that negotiable paper may be sold for such sum as the parties may agree upon, and that, whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true; and if the plaintiff had bought the notes in suit for \$500, before maturity and without notice of any defence, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them. *Fowler v. Strickland*, 107 Mass. 552; *Park Bank v. Watson*, 42 N. Y. 490; *Bank of Michigan v. Green*, 33 Iowa, 140. The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which \$500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly, that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts generally. In the case of the sale of real estate for a sum payable in instalments, and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud but not that paid afterwards. *Barnard v. Campbell*, 65 Barb. 286; *Lewis v. Bradford*, 10 Watts, 82; *Juvenal v. Jackson*, 2 Harris, 529; 2 Harris, 430; *Youst v. Martin*, 3 S. & R. 423, 430.

In *Weaver v. Barden*, 49 N. Y. 291, the court use this language; "To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration; that is, for value paid. Where a man purchases an estate, pays part and gives bonds for the residue, notice of

an equitable incumbrance before payment of the money, though after giving the bond, is sufficient. *Touville v. Naish*, 3 P. Wms. 306; *Story v. Lord Windsor*, 2 Atk. 630. Mere security to pay the purchase price is not a purchase for a valuable consideration. *Hardingham v. Nicholls*, 3 Atk. 304; *Maundrell v. Maundrell*, 10 Ves. 246, 271; *Jackson v. Cadwell*, 1 Cowen, 622; *Jewell v. Palmer*, 7 J. C. 65. The decisions are placed upon the ground, according to Lord Hardwicke, that if the money is not actually paid the purchaser is not hurt. He can be released from his bond in equity."

The plaintiff here occupies the same position as the *bona fide* purchaser of the first of a series of notes, of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no farther.

Upon receiving notice of the fraud, his duty was to refuse further payment; and the facts before us required such refusal by him. Authorities *supra*.

Crandell v. Vickery, 45 Barb. 156, is in point. Holdridge had obtained the indorsement by Vickery of his (Holdridge's) notes by false and fraudulent representations. These notes were transferred to Crandell without notice or knowledge of the fraud, he giving to Holdridge several cheques for the amount, upon the understanding that they were not to be presented for payment, but when the money was wanted, he was to give new cheques as needed. Before giving the new cheques, plaintiff was informed of the fraud, and requested not to make payment, or to give his cheques. He did, however, give his new cheques, according to the original agreement, and brought suit upon the notes against Vickery, the indorser.

It was held that he was not a *bona fide* holder, for the reason that the transaction was executory when he received notice of the fraud; that he had then parted with no value; that the real obligations were given afterwards, and under circumstances that afforded no protection.

That case is stronger for the holder than the one before us, in the fact that cheques were there given on the original transaction, which might have been presented or passed off to the prejudice of the maker; while here the transaction was oral throughout.

To the same purport in principle, although upon facts somewhat different, are the cases of *Garland v. The Salem Bank*, 9 Mass. 408, *The Fulton Bank v. The Phoenix Bank*, 1 Hall, 562, and *White v. Springfield Bank*, 3 Sandf. S. C. 227.¹

The cases are numerous that where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without consideration, as collateral security, he holds for the amount advanced upon it, and for that amount only. *Williams v. Smith*, 2 Hill, 301.

In *Allaire v. Hartshorn*, 1 Zab. 663, the case was this: *Hartshorn*

¹ Sandford's Superior Court Reports, New York.

sued Allaire on a note of \$1500 at ninety days, made by Allaire. It was proved that the note had been misapplied by one Pettis, to whom it had been intrusted; that he had pledged it to the plaintiff as security for \$750 borrowed of him on Hegement's cheque, and also as security for a \$400 acceptance of another party then given up to Pettis.

On the trial, the court charged the jury, that, if any consideration was given by the plaintiff for the note, "they should not limit their verdict to the amount so given, but should find the whole amount due on the face of the note." The case was carried to the Court of Errors and Appeals of the State of New Jersey, upon an exception to this charge. The court reversed the judgment, holding that, although a *bona fide* holder, Hartshorn could recover only the amount of his advances.

The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser.

No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any. The judgment below is based upon authority, and upon the soundest principles of honesty and fair dealing. It has our concurrence, and is

Affirmed.

HASCALL v. WHITMORE.

Supreme Court of Maine, April, 1841. 19 Maine, 102.

One who purchases commercial paper for value, with notice of defect in its inception, from a *bona fide* holder without notice, stands upon the rights of the latter, and may recover the amount of the paper.¹

THE case is stated in the opinion of the court.

[Argument reported.]

SHEPLEY, J. The plaintiffs are joint owners of a negotiable promissory note purchased before it became payable. One of them is a holder for value without notice; the other with notice, but deriving his title through others who were *bona fide* holders without notice. As between the original parties the note may be regarded as made without consideration. Andrews, who was the first and an innocent indorsee for value, did not indorse it when he disposed of it, and he was properly admitted as a witness. *Whitaker v. Brown*, 8 Wend. 490. He could have collected it, for the want of consideration could not be set up against him. A knowledge of the facts acquired after-

¹ N. I. L. § 75.

ward would not affect his rights. He had not only a legal right to hold and collect it, but to negotiate it. And the maker could not impair that right by giving notice that it was made without consideration. Nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before.

Bayley states that the want of consideration cannot be insisted upon "if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valuable consideration." Bayley, 550, ed. by Phillips & Sewall.

The case of *Thomas v. Newton*, 2 Car. & P. 606, was *assumpsit* on a bill drawn by Wilson on the defendant and accepted, and by him indorsed to Dandridge and by him to the plaintiff. The defence was a want of consideration. Lord Tenterden says: "If the defendant shows that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by Dandridge;¹ for if either the plaintiff or Dandridge gave value for it, the plaintiff may recover; otherwise the defendant is entitled to recover."

In *Solomons v. The Bank of England*, 13 East, 134, 135, note b, it appeared that the bank-note had been obtained fraudulently from Batson & Co., who informed the bank of it. The plaintiff as holder claimed payment of the bank, and it was refused. He had received the bill of Hendricks & Co.; and it did not appear that he paid value for it before notice. Lord Kenyon says: "Upon this evidence I think Solomons must be considered to be in the same situation as Hendricks & Co." But as it did not appear that they were holders for value without notice, the plaintiff did not recover.

In *Smith v. Hiscock*, 14 Maine, 449, where a negotiable promissory note had been indorsed *bona fide* and for value before it was payable, the Chief Justice says: "The want of consideration is not an available defence against a subsequent holder, to whom it may have been passed after it was due. The promise is good to the first indorsee free from that objection; and the power of transferring it to others with the same immunity is incident to the legal right which he had acquired in the instrument. By the first negotiation the want of consideration between the original parties ceases as a valid ground of defence."

If the relations between the maker and the holder only were to be considered, the want of consideration would be a good defence against one who did not purchase for value, or who did so after it was once due. And yet it has been decided that one so situated may avoid that defence by showing that it could not have been interposed against a prior holder. The same principle appears to be equally

¹ This doctrine has been exploded. See Bigelow, Bills and Notes, 252; Paton v. Coit, *post*, p. 457. Cf. N. I. L. § 76.

applicable to a holder who has purchased with notice. If the relations between himself and the maker only were to be considered, he could not recover; but purchasing of one who had no notice, he must be considered to be in the same situation and as entitled to the same protection.

Defendant defaulted and judgment for amount due on the note.

CHEEVER v. THE PITTSBURGH, ETC. RAILROAD CO.

Court of Appeals of New York, October, 1896. 150 N. Y. 59;
44 N. E. Rep. 701.

And this is true though the purchase be after maturity.

ACTION by the indorsee against the maker of a promissory note.
The facts are stated in the opinion.

[Argument reported.]

O'BRIEN, J. The complaint in this action contained four separate causes of action, each upon a promissory note of the defendant. The last two causes of action were not defended, and upon these the plaintiff recovered, but was defeated upon the two notes embraced in the first and second causes of action. The defence to these two notes was that they were made by the defendant's president, one M. S. Frost, and by him wrongfully diverted from the uses and purposes for which they were intended to his own personal or private benefit, or the benefit of a firm of which he was a member, and that the plaintiff is not a *bona fide* holder, but chargeable with notice of these facts.

The following are copies of the two notes in controversy, with the indorsements thereon when put in circulation by the defendant's president:

"\$5000.

GREENVILLE, PA., Feb'y 24th, 1888.

Four months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City.

THE PITTSBURGH, SHENANGO & LAKE ERIE RAILROAD COMPANY.

By M. S. FROST,
President.

Value received.

Attest,

E. S. TEMPLETON, *Secretary.*"

Indorsed:

“Pay to the order of M. S. Frost & Son,
JOHN T. BRUEN,
M. S. FROST & SON.”

“\$5000.00

GREENVILLE, PA., Feb’y 24th, 1888.

Three months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City.

THE PITTSBURGH, SHENANGO & LAKE ERIE RAILROAD COMPANY.

By M. S. FROST,
President.

Value received.

Attest,

E. S. TEMPLETON, *Secretary.*”

Indorsed:

“JOHN T. BRUEN,
M. S. FROST & SON.”

The body of these notes and every part of them except the signature of the president was in the handwriting of Templeton, the secretary. The president was authorized by the board of directors to issue the corporate notes to the extent of \$10,000 for the purpose of purchasing flat cars. In March, 1888, before the notes became due, Frost went to Boston and there negotiated a cash loan of \$30,000 from Francis A. Brooks for the benefit of M. S. Frost & Son, giving the firm note therefor and delivering to him the two notes in question, indorsed as they now appear, with other obligations, as collateral security for the payment of this loan. Subsequent to the maturity of the notes Brooks became the absolute owner by consent of the pledgor and the proceeds applied upon the debt, and still later he transferred them to a third party, and they have come to the hands of the plaintiff for value. It is not claimed that the plaintiff occupies any other or different position than Brooks would if he had brought the action upon the notes at maturity. Bruen, the payee of the notes, was the private secretary of Frost, the president, and the notes were made payable to him by Templeton, the secretary of defendant, who drew them in that form at the suggestion of the president. There is not and cannot be any dispute with respect to the authority of Frost to make the notes. They were made with sufficient authority, the fraud upon the defendant consisting in the wrongful use of them when made for a legitimate purpose by the president for his own private business.

Nor is there any dispute with respect to the fact appearing on the

plaintiff's case, that Brooks paid value for the notes and made present advances in cash to Frost in the sum already stated. It is equally clear upon the record that Brooks had no actual knowledge of the facts surrounding the origin of the paper or of the diversion of it by the president. He received the notes and made the advances in Boston, whereas they were made and the transactions stated with respect to them took place in a distant state, where the office of the company was, and is indicated on the paper as the place where made.

The learned trial judge held as matter of law that the plaintiff could not recover upon the notes for the reason that he was chargeable with knowledge of the facts and circumstances that rendered them invalid in the hands of Frost. The plaintiff is, doubtless, chargeable with such knowledge or notice as to the antecedent equities of the defendant as Brooks, his assignor, had, but with no others. If the notes were valid obligations in the hands of Brooks the plaintiff may assert every right that he could have asserted. It needs no argument to show that if Brooks had knowledge or notice, or is in law chargeable with knowledge or notice of the fraud by means of which the notes were diverted from the purpose for which they were authorized to be made, that the plaintiff cannot recover. But it is not claimed that he knew anything about the origin or diversion of the paper in fact. All that is claimed is that when it was presented to him in Boston by Frost, whom he knew to be the president of the railroad, there was enough upon the face of the paper to put him upon inquiry, and, therefore, to charge him with knowledge of all the facts that such inquiry would have disclosed. He knew nothing, so far as appears, outside of the paper itself, except the fact that the party presenting it was defendant's president and that he was proposing to pledge the notes for his own debt, or rather for the debt of his firm, which for all the purposes of the question may be assumed to be the same thing. The question in the case is, therefore, reduced to a very narrow inquiry, and that is whether Brooks, standing in all other respects in the position and sustaining the character of a *bona fide* purchaser of negotiable paper, is deprived of that character and the benefits of that position by reason of anything appearing upon the face of the notes themselves.

The mind, at the threshold of the inquiry, encounters two principles that point in opposite directions and lead to different conclusions, as the one or the other is allowed to preponderate in the mental process of determining the legal rights of the parties. On the one hand is the principle which protects a *bona fide* holder of commercial paper from existing antecedent equities between the parties, and on the other the principle which protects a corporation from the unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented

for discount or sale before due. He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail. *Magee v. Badger*, 34 N. Y. 249; *Am. Ex. Nat. Bk. v. N. Y. Belting, etc. Co.*, 148 N. Y. 705; *Know v. Eden Musee Am. Co.*, 148 N. Y. 454; *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y. 202; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652.¹

Applying these rules to the conceded facts of the case, it seems to me to be impossible to impute bad faith to Brooks in the transaction. He advanced a large sum of money on the faith of the paper, without any actual knowledge that the relations of the party with whom he dealt to the paper were different from what they appeared to be on the face of it. The question now is, not what the facts were, but what they appeared to be, and what he had the right, from the notes themselves, to assume. He had the right to assume that the relations to the paper of every party whose name appeared on it were precisely what they appeared to be. *Hoge v. Lansing*, 35 N. Y. 136. He had the right to believe that the notes had been issued by the defendant to Bruen for value in the regular course of business, and were by him transferred to Frost & Son in like manner. There was nothing to suggest to him that Frost was dealing with paper that belonged to the railroad for his own benefit. The appearances were that the defendant had put the notes in circulation by delivery to Bruen, and that they came to Frost's firm in the regular course of business for value and were then the property of the firm. It is quite true that all these appearances were deceptive and that the actual facts were otherwise. But how was a banker or business man in Boston to know or suspect that Bruen was only the nominal payee and a mere instrument in the transaction to enable the president to divert the paper to his own use. The name of the party who presented it and had it in his possession appeared on the face of the paper to have signed it as president. The name of another officer of the corporation was upon it also, attesting its regularity, and everything was in his handwriting ex-

¹ And see *Goodman v. Harvey*, *ante*, p. 391; N. I. L. § 73.

cept the signature of the president and the indorsement of the payee. So far as Brooks was concerned, the paper showed that it had been issued to a stranger in the regular course of business, and, through his indorsement, had come to the hands of a mercantile firm of which the president of the corporation was a member. If this were the fact, there is no doubt as to his right to use it in the business of the firm. The holder of a note who has no actual knowledge or notice of a defect in the title, or other equities between the parties, when circumstances come to his knowledge sufficient to put him upon inquiry, is chargeable with knowledge of all the facts that such inquiry would have revealed.¹ The difficulty in this case is to find the circumstance which can be said to be sufficient to put Brooks upon the inquiry. There was absolutely nothing on the face of the paper except the signature, as president, of the party who was dealing with it, and that, we think, was not sufficient in view of the fact that the appearances were that he was a purchaser from a third party.

The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it. *Hanover Bank v. Am. Dock & T. Co.*, 148 N. Y. 612; *Bank of N. Y., etc. v. Am. Dock & T. Co.*, 143 N. Y. 559; *Wilson v. M. E. R. Co.*, 120 N. Y. 145; *Gerona v. McCormick*, 130 N. Y. 261. There are numerous cases that belong to that class cited by the learned counsel for the defendant on his brief. There is a manifest distinction between them and the case at bar. Here the officer was not dealing with the corporate notes payable to himself but with notes that had been regularly issued, so far as appeared from their face, to a stranger and by him transferred to a firm of which the officer was a member and for which he acted as agent in procuring the loan from Brooks and pledging them as security. The presence of Frost's name upon the paper, as one of the agents who issued it, was not naturally or reasonably calculated, under the circumstances, to arouse suspicion in the mind of Brooks, or to lead him to believe that the president was attempting to defraud the corporation in disposing of the notes. None of the cases cited by the learned counsel for the defendant sustain the proposition that such a circumstance is sufficient to put the purchaser of negotiable paper upon inquiry or charge him with knowledge of the fact in case he fails to make it, and there are many cases that tend to support the contrary view. *Am. Ex. Nat. Bank v. N. Y. B. & P. Co.*, 148 N. Y. 698; *Miller v. Consolidation Bank*, 48 Penn. St. 514; *Walker v. Kee*, 14 S. C. 142.

¹ See explanation of this language, *Bigelow, Bills and Notes*, 237.

It is said that if the plaintiff's right to recover in this case is sanctioned by this court, an easy way will be opened for the perpetration of frauds upon corporations by officers intrusted with its negotiable obligations, and that the device of making the paper payable to the order of a nominal payee, interested or aiding in the fraud, will be a favorite one to accomplish the end. We must leave all such cases to be dealt with upon the peculiar facts and circumstances as they arise. It is more reasonable and just to assume that corporations will be able to protect themselves by proper vigilance from the dishonesty of their own officers, than to impute to parties who have taken the paper for value, ignorant of its origin, constructive knowledge of the facts upon such circumstances as exist in this case.

We think that there was nothing on the face of the paper or in the facts shown to warrant the court in holding as matter of law, as it did, that the obligations were received by Brooks and the advances made on them *mala fide*. That is the effect of the ruling at the trial, and the conclusion was not supported by the facts.

It follows that the judgment must be reversed and a new trial granted, costs to abide the event.

BARTLETT, J., wrote a dissenting opinion.

NOTE. — Knowledge of facts sufficient to charge the purchaser with notice of any defect, is here spoken of in the sense of the law merchant: "The rights of the holder are to be determined by the simple test of honesty and good faith"; but facts may appear upon the instrument itself which will fix the holder with notice of infirmities; e. g. in *National Bank v. Law et al.*, 127 Mass. 72, Law made a note payable to the order of P. & Co., a copartnership of which he was a member. P. & Co.'s name was indorsed by another member of that firm, and above this indorsement Law wrote the name of S. & Co., another partnership, of which he was also a member. The plaintiff purchased the note from a member of the firm of P. & Co. before maturity and without knowledge of any defect in the instrument. It was held that the plaintiff was charged with notice that the firm of S. & Co. was an accommodation indorser, and that Law had no implied authority to sign the name of that firm for such a purpose; and as Law had no express authority so to sign, S. & Co. were not liable to the plaintiff.

This may be referred to the same test, — to turn aside from facts such as here appear, is bad faith in the sense of the law merchant.

[Equities are defences in the nature of cross-rights of action, which admit the existence of a contract, but which render the contract defeasible between the parties thereto and all others, except *bona fide* holders, or those who stand upon the rights of such holders.¹]

PUTNAM *v.* SULLIVAN.

Supreme Court of Massachusetts, March, 1806. 4 Mass. 45.

Frard inducing the contract is an equity, and is not available as a defence against a *bona fide* holder.

CASE by the indorsees against the indorsers of a promissory note, dated December 1, 1804, payable to the defendants or their order. The action was tried at the last November term, before PARKER, J., when a verdict was given for the plaintiffs for the amount of the note and interest, subject to the opinion of the court, whether, upon the facts proved, and which were to be reported by the judge, the action could be maintained. If the court should be of that opinion, judgment to be entered according to the verdict, with additional damages for interest to the time of the judgment; if the court should be of a different opinion, a new trial to be granted.

Those facts were in substance that the note was payable in ninety days from the date with grace; that the plaintiffs were innocent indorsees, having received the note indorsed in blank, and paid a valuable consideration for the same. The handwriting of the promisor and indorsers was admitted, the latter being the handwriting of W. B. Sullivan, a partner of the house doing business under the firm of Jno. L. Sullivan & Co. The note being lodged in the Boston bank for collection, notice was left at the lodgings of the promisor by the messenger of the bank, on the 28th of February, 1805, and on the 3d of March following the said W. B. S., one of the indorsers, was notified that the note was unpaid. It was also in evidence that the promisor had absconded before the note fell due, and that this fact was known to all the parties at the time.

One of the defendants being abroad in Europe, and the other, about the 1st of December, 1804, having occasion to make a journey from Boston to Philadelphia, intrusted with an apprentice or clerk of the house a number of papers, on which one of the house had written the name of the firm in blank, some to be used as notes indorsed by the house, and others as notes in which the house were to be promisors. These papers were intrusted to a clerk of the defendants, to be used when money was to be advanced on the sale of goods by the house on commission, or to renew the notes of the house when due at the banks. The clerk was directed to be careful of the blanks

¹ Bigelow, Bills and Notes, 232.

left with him, and not to use any for the advance of money on the sale of goods on commission without consulting a brother of the partners. He was further directed to deliver one of the blanks to the promisor upon the note sued in this action, to enable him to renew a note signed by him then in the bank, of which the house were indorsers, and for which he had requested a blank to be left. The promisor called on the clerk for the blank indorsement left for him, and one was delivered to him; afterwards, pretending that by some mistake it had become useless to him, and feigning to burn, in the clerk's presence, the name of the firm indorsed, procured another blank, and by a similar pretension and contrivance he obtained a third and a fourth blank indorsement, the last of which was in fact used for the purpose, for which the house had directed a blank indorsement to be given him. The promisor had used one of the prior blank indorsements for making the note sued in this action; which had been negotiated, with the indorsement remaining in blank, to the plaintiffs.

[Argument reported.]

PARSONS, C. J. [Question of want of demand on the promisor here considered, the court holding that demand was not necessary to hold the indorsers, the promisor having absconded.¹]

The second objection is, that the defendants did not, in construction of law, indorse this note.

On the facts in this case we are to decide who shall suffer the loss of the money, — the plaintiffs, who, it is agreed, are innocent indorsees, or the defendants.

It is objected that this note ought to be considered as a forgery of the names of the indorsers; because a note was afterwards written on the face of the paper by the promisor, not only without the direction or consent of the defendants, but against their express instruction; and therefore that it was a false and fraudulent alteration of a writing, to the prejudice of the indorsers.

This objection would have great weight, if, when the indorsers put the name of the firm on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement; for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promisor, who by false pretences had obtained it,

¹ See *ante*, pp. 302, 304.

the fraudulent use of it would not be a forgery; because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with a power of using these indorsements, (although his discretion was confined), as a delivery by one of the house; whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any but to himself and to his principals.

It is further objected that, if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge indorsers against an innocent indorsee. The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser, through fraudulent pretences, has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of this description, but a different note, and for a different purpose.

Perhaps there may be cases in which this distinction ought to prevail; as if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him.¹ But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here one of two innocent parties must suffer. The indorsees confided in the signature of the defendants, and they could have no reason to suppose that it had been improperly obtained. The note was openly offered to the plaintiffs by a broker, and when they objected on account of the absence of both the indorsers, they were answered, on the information of the promisor, whose character then stood fair, that blank indorsements had been left with the clerk, and that the indorsers had before indorsed a number of notes for the same person, which had been negotiated by a broker. On the other hand, the loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or too unexperienced to guard against the arts of the promisor. It is to be regretted that the blank indorsements had not been deposited with the brother of the partners, who was directed to be consulted as to the use of them; for then no innocent person would have been a sufferer.

From a view of all the facts, as they are presented to us, it is our opinion that the indorsers must be holden, and that judgment must be entered according to the verdict, with the additional interest agreed.

In forming this opinion, we have been necessarily led to consider

¹ See *ante*, p. 360.

the effect of a different opinion on the commercial part of the community. How far it is common for merchants to intrust their clerks with blank signatures or indorsements, is not known. But when merchants are in the habit of indorsing for each other at the banks, it is very common to put their names on blank paper, and deliver them to the party to be accommodated, for the express purpose of obtaining a renewal of certain notes, when they become due. And if the party having these signatures should employ them as names to other negotiable securities not contemplated, and the signatures should for that reason be void, much injury might result to innocent indorsers, or the bank discounts would be greatly embarrassed.

CLARK v. PEASE.

Supreme Court of New Hampshire, December, 1860. 41 N. H. 414.

So, too, of duress.

THIS is an action of *assumpsit* counting upon the promissory note of the three defendants, dated July 26, 1858, for \$112.50, payable to one Theodore P. Clark, or order, on the first day of the following November, and by the payee indorsed and delivered, on the day of its date, to the plaintiff. There was also a count for money had and received, to the amount of \$300. Plea, the general issue.

The defendants offered to prove that on the day before the giving of the note, all of the makers except Charles Pease were arrested at Ellsworth, in Grafton County, by Calvin Clark, a deputy sheriff, by the procurement and with the aid of the payee, and held by them in custody until the next day, when they were carried by them to Plymouth, and were held in custody until, to effect their liberation, this note was given, the said Charles Pease signing as the surety of the others; that the arrest was made without any warrant or other lawful authority; but it was represented by the sheriff that they were arrested for the criminal offence of malicious mischief, and that he had the right to arrest them without a warrant; that this note, with two others, amounting in all to \$250, was given to said Theodore P. Clark to obtain the release from duress of the three principals in the note, and upon the promise by the payee that they should then be set at liberty, and he would prosecute them no further; and upon the execution of the note they were set at liberty accordingly.

The plaintiff excepted to this evidence, as no defence against the indorsee, without proof that he was not the *bona fide* holder of the note. But the court ruled that if the note was obtained by duress, it was void in the hands of an innocent indorsee, and thereupon the plaintiff, admitting for the purposes of this trial that the defendants'

witnesses would testify to the facts stated, a verdict for the defendants was taken by consent, subject to the opinion of the court; and the questions thus raised were reserved, and assigned to the determination of the whole court.

[Argument reported.]

SARGENT, J. That the case presented is clearly one of duress, there can be no question. The abuse of any process, either civil or criminal, to compel a party, by imprisonment, to do any act against his will except to pay the debt for which he is arrested, is entirely illegal, and the act may be avoided on the ground of duress. *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; *Shaw v. Spooner*, 9 N. H. 197; *Burnham v. Spooner*, 10 N. H. 523; *Breck v. Blanchard*, 22 N. H. 303. Here the arrest was without any warrant or lawful authority. Such duress is a perfect defence, upon all the authorities, to an action between the original parties.

The note in this case was not only void as between the original parties, on the ground of duress, but was given to compromise a charge of crime, and was wholly illegal upon that ground. *Plumer v. Smith*, 5 N. H. 553. But the principal question raised here by the ruling of the court is, whether such a note is absolutely void in the hands of any holder; and if not, then another question arises upon the exception which was taken by the plaintiff, which is this; after an indorsee has made out a *prima facie* case by proving the indorsement, etc., and the defendant has shown that the note was obtained from him by duress, upon whom rests the burden of proof? Must the defendant prove that the plaintiff was not the *bona fide* holder, and that he did not pay a valid consideration for it, as the plaintiff claimed? or, the duress being proved, does that throw the burden of proof upon the plaintiff, to prove how he came by the note, and the consideration he paid, etc., as the defendant claims? We will examine these questions in the order in which we have stated them.

I. Is this note absolutely void in the hands of any holder, however innocent, who has paid a valid consideration for it before it was due.

We find that the law holds certain persons to be incompetent parties to make contracts, on account of want of capacity. It has, therefore, wisely taken care of the interests of those who either have not judgment to contract, as in the case of infants, or who, having judgment to contract, cannot in law have any funds or property to enable them to perform the contract, as in the case of a *feme covert*; and therefore it has in general rendered the contracts of infants voidable, and those of married women absolutely void.¹ Ch. on Bills, 18. By our law an infant has not capacity to bind himself absolutely by a promissory note, as maker or indorser. Story, Prom. Notes, sec.

¹ But see Rev. Laws of Mass., ch. 153, § 2.

78. So a married woman is incapable, in any case, of becoming a party to a note or bill so as to charge herself with any obligation whatever, ordinarily arising therefrom. So contracts made with an alien enemy are absolutely void, upon the ground of disability to contract. This principle has its origin and confirmation in the law of nations. Persons insane, or imbecile in mind, have not the mental capacity to contract. This disability flows from the most obvious principles of natural justice, because persons in that condition, — lunatics, idiots, and persons *non compos mentis*, — being bereft of their reason, are, by the rules not only of municipal law but of universal justice, held to be utterly incapable of making contracts, and generally their contracts are absolutely void.¹ Story, Prom. Notes, secs. 85, 94, 100, 101; Edwards, Bills and Notes, ch. 2. There are some other parties that are held to be incompetent to contract, but these are the principal; and there are also some exceptions to some or all of the general rules above stated, which are not now important to be noticed. These doctrines are all familiar as elementary principles.

Contracts, therefore, purporting to be entered into by either of the above parties, are either void, or voidable, as the case may be, alike as against the other party to the original contract, and also, where the contract is assignable, they are void as to such incompetent parties, or are voidable by them, in the hands of any assignee or indorsee. These rules of law are founded upon the most common principles of natural justice and of public policy.

There are numerous other contracts, which, though made between competent parties on both sides, are nevertheless void as between such original parties. A contract made on Sunday, where the transaction of such business is prohibited, is an illegal contract, and void as between the parties. So a contract based upon an illegal consideration, as usury, gaming, spirituous liquors sold without license contrary to law, the compounding of a felony, etc., is void as between the parties. So a contract without consideration, *nudum pactum*, and one where the consideration has failed, as between the immediate parties, is void or voidable. So a contract entered into by compulsion under duress, or obtained by fraud, or circumvention of one in a state of intoxication, is void as between the parties. Other cases might be stated (see Ch. on Bills, 82–87), but these are sufficient for our present purpose. Where the contract itself is illegal, or is founded upon an illegal consideration, the parties are usually both violators of the law, and stand *in pari delicto*. In such case, any contract for the payment of money or the performance of any service cannot be enforced as between the parties; nor, if money has been paid or property transferred by one party to the other under such contract, where both parties are alike in fault, can it be recovered

¹ But cf. *Carrier v. Sears*, 4 Allen, 336.

back, because in such cases, "*Potior est conditio possidentis.*" But in cases of duress, fraud, or circumvention, the fault was all upon one side, and the innocent party, upon whom the duress or the fraud was practised, may not only avoid the contract entered into under these circumstances, but if he pay money, or deliver property, he may recover it back again. Now bills and notes stand upon the same foundation as all other contracts do, in all the above respects, so long as they remain in the hands of the original payee. But bills and notes have another attribute, which other contracts ordinarily do not possess, — that is, negotiability. Where a bill or note has been negotiated, and passed into the hands of a *bona fide* holder before it is due, and for a valuable consideration, in such case the holder acquires rights which did not belong to the payee. He stands in a different relation to the promisor. These additional rights and privileges have been conferred upon such holder by law, for good and sufficient reasons, too well known and understood to need to be stated, but which are incident to and dependent upon the attribute of negotiability, which these instruments possess.

It may be laid down as the general rule, as the general principle applying to this class of cases, that such a note, thus negotiated, and in the hands of such a holder, is not liable to any defence which the maker had as against the original payee. To this general rule there are some exceptions, among which are:

1. When a statute not only prohibits the making of a contract, but provides that the same shall be void to all intents and purposes; or where the law provides that any contract made or securities given upon any illegal consideration shall be absolutely void, then the note which embodies such contract, or is based upon such consideration, is held void everywhere and in the hands of every holder. In England, and in most of the United States, there are or have been laws against usury, which not only, by a general prohibition of usury, made that an illegal consideration for a note, but also provided that all bills or notes founded upon such a consideration should be absolutely void. Such, however, is not the law in this State on that subject, and it is believed that we have no statutes with similar provisions. Hence, here usury may be a good defence to a note as against the original party, but not as against an innocent indorsee, for value, etc.

2. Where the note is a forgery, it is void everywhere.

3. When the maker belongs to a class of persons who are ordinarily, and, as a general rule, on grounds of public policy, held incompetent to contract at all, such as infants, married women, alien enemies, and insane persons, including spendthrifts, and others under guardianship, who have been by some statute declared incompetent to contract.

4. Notes signed by agents without authority.

In none of these cases (except the first, which, as we have seen,

does not apply in this State) is a note valid in the hands of any one; and the party who discounts such paper is bound to inquire, at his peril, whether the note offered to him is signed by a party capable and competent in law to bind himself, or by an agent duly authorized to bind his principal. Beside this, he is bound to inquire whether the party from whom he receives it is competent to make such transfer in his own right, or is authorized to do it for his principal, for whom he assumes to act.

If there is a failure in either of these points of capacity or authority, it will not avail the party that he is a *bona fide* holder, for value, without notice. He must look to his indorser if he has one, and if he has not he must suffer loss.

5. Another case might be mentioned, which has been made an exception to the general rule above stated by express provisions of the statute,—as where a note is attached by the trustee process. There, by operation of the statute, the maker of a note may have a perfect defence against an indorsee, for value, without notice, and before due. So notes discharged by operation of insolvent laws might afterward be transferred, by possibility, so as to form another exception, where the indorsee, holding the note *bona fide*, etc., might be met with a perfect defence on the part of the maker. But these last cases throw no light upon the question we are considering. These are the principal, perhaps all the exceptions to the general rule above stated, that no defence is available against an innocent indorsee, for value paid before due. But where the contract was illegal, as usury, wagers, compounding a felony, restraint of trade or of marriage, etc., or where there was a want or failure of consideration, and even where the note has been paid,—all these defences, and many more, cannot be made against the note in the hands of such a holder. And the question here raised is, whether, in case of duress, or fraud, where there is *mala fides*, but it is all on one side, and the other party to the note has been induced to sign it by force or by fraud, and is in every respect an innocent party, such defence shall avail him as against such a holder, for value, etc., who seeks to collect it.

And we think such a defence cannot avail the maker against such an indorsee of the note. The authorities favor this view. Kent, in his Commentaries, vol. 2, sec. 39, speaks of contract generally, and on page 453 says, "If a contract be entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it by plea of duress; and it is requisite to the validity of every agreement that it be the result of a free and *bona fide* exercise of the will. Nor will a contract be valid if obtained by misrepresentation or concealment," etc.

He here speaks, evidently, of the contract as between the original parties to it, or of contracts in general as distinguished from negotiable notes and bills; because he devotes another chapter especially

to a consideration of bills and notes, in which he says, in speaking of the right of the holder (vol. 3, pages 79, 80), that a *bona fide* holder can recover upon such note, though it came to him from a person who had stolen or robbed it from the true owner, provided he took it innocently in the course of trade, for a valuable consideration, and under circumstances of due caution; and he need not account for his possession of it unless suspicion be raised. This doctrine is founded on the commercial policy of sustaining the credit and circulation of negotiable paper. Suspicion must be cast upon the title of the holder by showing that the instrument had got into circulation by force or fraud, before the *onus* is cast upon the holder of showing the consideration he gave for it.

Chitty says (Ch. on Bills, 72), "In general there will be a sufficient defence between the original parties when the bill or note was obtained by duress or by fraud, or by circumvention," etc. But he nowhere intimates that any of these defences would be good against an innocent indorsee; but, on the contrary, he expressly says (page 79), "The circumstance of a bill or note having been obtained without adequate consideration, or even by duress or fraud, or misapplied by an agent to his own use, affords no defence where the instrument comes into the possession of a *bona fide* holder, for value, without notice, and before it is due."

In *Doe v. Burnham*, 31 N. H. 431, the rule is laid down very broadly, and without those qualifications and exceptions which we have heretofore seen must necessarily always accompany it. Eastman, J., delivering the opinion in that case, says that where a note is indorsed in the usual and ordinary course of commercial business, all the authorities "sustain the broad rule that a *bona fide* holder for a valuable consideration, who becomes such before the dishonor of the note, takes it free from all defences between prior parties"; and see cases there cited. He also quotes Shaw, C. J., in *Wheeler v. Guild*, 20 Pick. 545,¹ as stating the rule in Massachusetts substantially in the same way, and then adds: "We are not aware that in this State there is any exception to the universality of the rule."

Now this rule, in the general and broad terms in which it is laid down, is at once seen to be incorrect, because in case of notes forged, or signed by an agent having no authority, or by an infant, a married woman, an alien enemy in time of war, or an insane person, exceptions to this rule have been seen to exist necessarily. But if the intention was merely to state a general rule, subject to such limitations and exceptions as general rules are usually subject to, it is undoubtedly correct; and in that view it is broad enough to cover our present case, because in this case the signature to the note is genuine, and no forgery. No question of agency or authority arises,

¹ *Post*, p. 461.

nor does the signer belong to either of the classes whom the law holds incompetent to contract.

Suppose an individual, then, were about to purchase a note payable to bearer, before it was due, and pay a fair equivalent for it, with a view of collecting it of the maker, and where he is to have no indorser to rely upon, — what would be his duty in order to proceed safely? First, he must assure himself of the genuineness of the signature, or if it purported to be signed by an agent, he must assure himself that the agent was duly authorized to bind his principal in that particular; secondly, he must make such inquiries, which, ordinarily, he may easily do, as to ascertain that the signer is not an infant, a married woman, an alien enemy, an insane person, etc., — that he does not belong to a class of persons who are always presumed by the law to be incompetent to contract; and thirdly, he might need, for his own safety, to inquire whether the signer of the note had been trusted, or whether any other special statute could affect his claim to it. When he has satisfied himself upon these points, if he learns of no other defects, and the signer is of sufficient ability to respond, he may purchase; and there is generally very little trouble in ascertaining these facts. They are usually matters of public notoriety, about which there can be little room for mistake.

But, suppose that after being satisfied upon all these points, and having purchased the note, it should prove that it was an illegal contract, or was for an illegal consideration, — who shall suffer? the maker, or the indorsee? This is settled on the best of authority. The original parties stood upon equal ground, both being in fault, and could neither of them enforce the contract; yet neither shall be allowed to take advantage of his own wrong as against an innocent indorsee.

And suppose it should turn out that his note was obtained of the maker by fraud or by duress, a case in which the maker was in no fault, — what rule shall be applied here? — the long-established one, that where one of two innocent persons must suffer, the loss should fall upon him who has suffered a negotiable security, with his name attached to it, to get into circulation, and thereby mislead the indorsee. Such rules, and such an application of them, are necessary to give security to negotiable paper.

The defendant's counsel claim that the same rule that would hold the maker of a note, who signed it under duress, to pay it to the innocent holder, for value, would hold infants, and others who are incompetent to contract, to pay their notes when thus held; but this is neither a legal nor a logical sequence. The infant belongs to a class, all of whom are held by law to be incompetent to bind themselves by their contracts. In the other case, the man belongs to a class amply competent to contract; is under no general disability as the infant is; is never to be presumed to have signed any note

under duress, because that is a condition never to be presumed in case of a free man, who may have signed a thousand notes and never have signed but this one under duress. Is suspicion to be cast upon all notes that are known to be properly signed, and against men under no disability, simply because it is possible that such a note may be obtained by duress or fraud?

Take also the case of a slave. There the general rule is, that he is incompetent to contract; and if a man were about to purchase a note, and, upon inquiry as to who the signer was, should learn that he was a slave, that would be sufficient notice to him that the note was void, because all contracts made by all slaves usually are so, because, while in that condition they must necessarily be constantly under duress of body, mind, and will. But when it is ascertained that the signer is a free man, then the presumption is that he is never under duress, and there are only rare exceptions to this general rule; and to say that in such exceptional cases the maker shall be allowed to stand upon such a defence against an innocent holder for value, taking it in the ordinary course of mercantile business before the maturity of the note, would be to overthrow all confidence in negotiable paper, and entirely reverse the policy of the whole system of mercantile law. The exception to the ruling of the court upon this point must be sustained; but we shall find that the numerous authorities which bear upon the next question to be considered, have also a direct bearing upon this point.

II. [A question of the burden of proof. See *Paton v. Coit*, *post*, p. 457.]

A new trial granted.

SONDHEIM v. GILBERT.

Supreme Court of Indiana, November, 1888. 117 Ind. 71; 18 N. E. Rep. 637.

So of illegality at the common law or by statute, except where the statute makes the contract absolutely void.

ACTION by the holders against the makers of a promissory note. The facts are stated in the opinion.

[Argument not reported.]

MITCHELL, J. This was a suit by Samuel and Henry P. Sondheim, partners doing business under the firm name of Sondheim Brothers, against John Gilbert, assignee of Miller Brothers, insolvents, to establish a claim against the partnership estate of the latter in the hands of the assignee.

It is averred in the complaint that Conrad and Jacob Miller had theretofore been partners doing a general mercantile business in the city of Evansville, under the firm name of Miller Brothers, and that, on the 11th day of December, 1885, they executed their promissory note, payable to themselves in six months after date, in the city of New York, for \$7264.11. It is averred that Miller Brothers afterwards negotiated the note by indorsement in blank, and that after it passed through the hands of divers persons, the plaintiffs became the owners of the note before its maturity, having paid therefor the full face value, without any notice whatever of the consideration for which it was given. The law of the State of New York, the note having been executed and made payable in that State, is set out in the complaint, and it appears therefrom that notes, drawn in the form of that sued on, are negotiable according to the custom and law of merchants.

The case was disposed of in the court below by a ruling on a separate demurrer to certain answers, which set up substantially the following facts, viz., that at the date of the execution of the note, the Miller Brothers were engaged in the dry goods business in the city of Evansville, and that Conrad Miller, one of the members of the firm, made an agreement with Morris Ranger, without the knowledge or consent of Jacob Miller, the other member of the firm, that they, Ranger and Conrad Miller, should engage on joint account in speculating in cotton futures upon the New York cotton exchange; that they agreed to buy, on joint account, fifty thousand bales of cotton to be nominally delivered during some months in the future; and that it was understood and agreed between them that no cotton was to be actually bought, sold, received or delivered, but that, after making pretended purchases, if the price should advance or decline on the New York cotton exchange, there was to be a settlement of the differences accordingly, as the current price might be higher or lower than that nominally agreed upon at the time of the pretended purchase.

It is averred that, in pursuance of the foregoing arrangement, Conrad Miller executed the note sued on, together with a large number of other notes, without the knowledge or consent of his partner, and that the notes so executed were indorsed in blank by Conrad Miller, in the name of Miller Brothers, and placed in the hands of Ranger, to be used by him solely for the purpose of paying or securing losses or margins which were required to be put up in the contemplated transactions, which it is alleged were to be merely gambling or wagering speculations in cotton futures, and that the note sued on was made and indorsed for no other consideration whatever.

In some of the paragraphs of answer which set up substantially the foregoing facts, certain sections of a statute against gaming, and

affecting certain contracts and securities, alleged to be in force in the State of New York, are set out.

The court overruled the demurrer to the answers, and, the plaintiffs declining to reply, judgment was rendered disallowing the claim. The plaintiffs prosecute this appeal, and assign for error the ruling of the court in overruling the demurrer to the defendant's answers.

Upon a determination of the propriety of this ruling the judgment of the court below must either be affirmed or reversed.

Whether or not contracts, notes, bills and other securities, growing out of transactions similar to those contemplated by Ranger and Miller, as disclosed by the facts admitted by the demurrer to the answers, are valid and collectible, has been the subject of much consideration in the courts. As related to legitimate commercial transactions, and the recognized methods of conducting the mercantile business of the day, the importance of the question cannot readily be overestimated.

Formerly the rule was that articles which had no actual or potential existence at the time of the contract, were not the subjects of sale, but this was found to be such an impediment to commerce that some relaxation in the rule was deemed necessary. It is now established upon indisputable authority that a contract for the sale and future delivery of a commodity of a designated kind or class, which the seller does not own, and which has at the time no actual existence, but which may be supplied by purchase in the market at the proper time, is a valid contract, provided it is the intention of the parties, or of one of them, at the time the contract is made, that the commodity shall actually be procured by the seller, and supplied to the purchaser at or before the maturity of the agreement. *Cobb v. Prell*, 22 Am. Law Reg. N. S. 609 and note; *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745 and note.

In such a case it does not invalidate the transaction that the parties, or either of them, may have deposited money, as a margin, to secure the performance of the contract, or as indemnity against loss in case one or the other fails to consummate his agreement. As has been said, "present ownership is of less consequence than the intention of the contracting parties." *Cockrell v. Thompson*, 85 Mo. 510; *Wall v. Schneider*, 59 Wis. 352, 48 Am. Rep. 520; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390.

While contracts for the sale of property to be delivered in the future are valid, where the parties or either one of them, actually contemplate a delivery of the subject-matter of the contract, yet, if under the guise of a contract which has the appearance of validity upon its face, the real intention is merely to speculate on the rise or fall of the market, without any purpose that any property shall be delivered or received, but with the understanding that at the appointed

time the account is to be adjusted by paying or receiving the difference between the contract and the current price, then the whole transaction is illegal, as against public policy, and falls under the condemnation of the law. *Whitesides v. Hunt*, *supra*, and cases cited; *Irwin v. Williar*, 110 U. S. 499.

The facts stated in the answer make it clear that the transactions contemplated by Morris Ranger and Conrad Miller were not the actual purchase and acceptance of cotton, but mere speculative wagers upon the price of that commodity from time to time as it might be quoted on the New York cotton exchange. This was an agreement to engage in mere wild speculation in the nature of gambling or wagering upon the fluctuations in the price of cotton. Such transactions demoralize and embarrass legitimate trade, and are subversive of all correct business principles, destructive of commercial integrity and morality, and result directly or indirectly in most of the bankruptcies, defalcations, and forgeries which startle and distract business circles. Between the parties to such a transaction and all others who participate in the specific illegal design, with the intention of aiding in its execution, so as to become principals or accessories thereto, any contract or other security resulting therefrom will be wholly invalid. But in the absence of a statute in direct terms prohibiting transactions of the character of that in question, and declaring them unlawful, or expressly declaring promissory notes growing out of such a transaction invalid, while the courts will on general common-law principles declare such notes invalid between the parties and those who were accessory to the illegal act, yet in order to invalidate a note or other security in the hands of one who advanced money, which the borrower intended to and did employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and borrower that the money furnished should be used in aid of and to promote the unlawful enterprise, as that the former became *particeps criminis*. *Tyler v. Carlisle*, 79 Maine, 210; *Waugh v. Beck*, 114 Pa. St. 422; *Tracy v. Talmage*, 14 N. Y. 162; *Arnot v. Pittson, etc. Coal Co.*, 68 N. Y. 558.

Thus it was held in *Bickel v. Sheets*, 24 Ind. 1, that a contract for the sale of property which the purchaser intended to use for gaming purposes, in violation of a statute, was not void, although the seller was informed at the time of the sale of the purpose for which the property was to be applied. *Cummings v. Henry*, 10 Ind. 109; *In re Lister*, 25 Eng. Rep. (Moak) 647 and note; *Feineman v. Sachs*, 33 Kan. 621; *Distilling Co. v. Nutt*, 34 Kan. 724; *Fisher v.*

Lord, 63 N. H. 514; *Parsons Oil Co. v. Boyett*, 44 Ark. 230. There must be knowledge of and participation in the illegal or immoral purpose.

It is not necessary, however, that we pursue this feature of the case further, as it is conceded upon the record that the note in suit came to the hands of the plaintiffs in the due course of trade, before maturity, for value and without notice of the purpose for which it was executed or drawn. In order, therefore, to uphold a judgment which invalidates commercial paper in the hands of innocent holders, such as plaintiffs are conceded to be, it is essential that a statute should be shown governing the case, which in direct terms declares that transactions such as those here involved are unlawful and that notes given under the circumstances exhibited by the facts in this case are absolutely void.

The principle may be considered as well established that when a statute in express terms pronounces contracts, notes, bills, securities and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon, and the doctrine that transactions which a statute in direct terms declares to be unlawful, cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authority. *New v. Walker*, 108 Ind. 365; *Thompson v. Bowie*, 4 Wall. 463; *Vallett v. Parker*, 6 Wend. 615; 1 Daniel, Neg. Inst., sections 197, 807. In such a case the note will be declared void in the hands of an innocent holder in pursuance of the peremptory words of a statute which embraces in its terms the contract or obligation under consideration. *Town of Eagle v. Kohn*, 84 Ill. 292.

The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill or note, void. But, unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable. *Hatch v. Burroughs*, 1 Wood, 439; *Town of Eagle v. Kohn*, *supra*; *Third Nat'l Bank v. Tinsley*, 11 Mo. App. 498; *Third Nat'l Bank v. Harrison*, 3 McCrary, 316, 10 Fed. Rep. 243; *Edwards v. Dick*, 4 B. & Ald. 212; *Day v. Stuart*, 6 Bing. 109; *Chitty, Bills*, 92; 2 *Randolph, Com. Paper*, section 511.

It is argued, however, in support of the ruling below, that because the note sued on was negotiated in consideration of money advanced with which to prosecute a wagering or gambling speculation, it is, nevertheless, void in the hands of an innocent holder within the

provisions of section 4950, R. S. 1881, which declares, in effect, that all notes, bills, etc., when the whole or any part of the consideration thereof shall be for money or other valuable thing won on the result of any wager, or for repaying money lent, at the time of such wager, for the purpose of being wagered, shall be void.

The note in suit having been executed and made payable in the State of New York, and it appearing that the alleged illegal transactions contemplated by the parties concerned in issuing and putting the note in circulation were to be engaged in and consummated in the State of New York, the law of that State must be looked to primarily in determining the validity of the contract; the rule in that respect being that a contract, valid by the law of the State in which it is made and is to be performed, is valid and enforceable everywhere, unless it is clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced. *Tilden v. Blair*, 21 Wall. 241; *Wayne County Savings Bank v. Law*, 81 N. Y. 566; *Hawley v. Bibb*, 69 Ala. 52; *Stix v. Matthews*, 75 Mo. 96; *Swann v. Swann*, 21 Fed. Rep. 299; *Burns v. Grand Rapids, etc. R. R. Co.*, 113 Ind. 169; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Milliken v. Pratt*, 125 Mass. 374; *Hill v. Spear*, 50 N. H. 253.

A contract, although valid where made, will not be carried into effect if, by the laws of the State whose jurisdiction is invoked, the contract which is sought to be enforced is stigmatized as unlawful, and so prohibited.

Relying upon the invalidity of the note by force of the *lex loci contractus*, the appellee has, as we have seen, pleaded the statute of the State of New York, relating to gaming contracts, in one of the paragraphs of his answer. In the other paragraph he relies upon the statute of our own State to invalidate the note. By section 8 of the New York statute, all wagers, bets or stakes made to depend upon any lot, chance, casualty, or unknown or contingent event, are declared to be unlawful, and all contracts for or on account of any money, property or thing in action so wagered, bet or staked are declared void. The other section declares, in effect, that all securities, any part of the consideration of which is money won by playing at any game, or by betting on the hands of such as do play at any game, or to repay any money knowingly lent at the time and place of any such play to any person so playing, shall be utterly void. This last section can have no possible application to a transaction such as that disclosed by the facts in the present case. It would be an unwarranted perversion of common and correct speech to hold that the consideration of a note which had been executed in order to obtain money with which to purchase options, or to put up as margins in cotton speculations, was money won by playing at a game or by betting on the

hands of others who do play, or to repay money lent at the time and place of such play. However much dealing in options may resemble gambling or betting, and demoralizing and pernicious as it may be, it cannot, with any degree of propriety, be said to be winning or losing money by playing at or betting upon any game, within the meaning of the statute. *White v. Barber*, 123 U. S. 392.

In respect to section 8, above referred to, it may be said the distinction between contracts for or on account of any money, etc., wagered, bet or staked upon any game, and securities, bills, notes, etc., any part of the consideration of which shall be money won or lost by playing at any game, etc., is obvious.

The contracts mentioned are the agreements of the parties by which they undertake beforehand to bind themselves to pay or deliver to the winner the money, property or thing wagered, bet or staked on the game or contingent event. These are declared unlawful and void, and so they are, in whosoever hands they may be found. The things in action, notes, bills, securities, etc., referred to in the other section, are the evidences of indebtedness given for money won or lost by playing at any game, or by betting on the hands of those who play, after the event, or for money knowingly lent at the time and place of such play to a person so playing, and these are declared to be utterly void, and so they are, without regard to their form or the fact that they may be in the hands of an innocent holder. *City of Aurora v. West*, 22 Ind. 88; 1 Daniel, Neg. Inst., section 807; Chitty, Bills, 92; *New v. Walker*, *supra*; *Greenland v. Dyer*, 2 Manning & Ryl. 422; 2 Randolph, Com. Paper, section 511.

The note sued on does not fall within the terms of either section of the New York statute. The paper was made by, and was payable to, Miller Brothers. It was indorsed by them, or in their name, and delivered to Ranger, who advanced no consideration for it, but negotiated it to persons who took it for full value in the regular course of business without notice. Until the paper was negotiated for a consideration it had no legal inception as a promissory note. In the hands of the parties to the illegal transactions contemplated, it was not a note given upon an illegal consideration, but it was a paper without any consideration, signed merely for purposes of accommodation. After it was negotiated it became a promissory note, the consideration of which was money advanced by persons who had no notice of the illegal purpose for which the parties contemplated using it, and who were in no way or sense parties implicated in the illegal confederacy.

Having reached the conclusion that the statutes of the State of New York do not, in terms, render void mercantile notes, executed in consideration of money, which the parties receiving the money intended to embark in gambling speculations on the stock market, it only remains that we say that the statutes of our own State, already

referred to, indicate such a coincidence in the policy of both States as that the courts of this State will not hesitate to enforce the liability of a maker of a note such as that involved in the present case in the hands of an innocent holder.

It is not necessary that we should remark further upon the effect of the Indiana statute, as applied to notes growing out of transactions such as that under consideration, when such notes are executed and payable in this State.

It is enough to say that we are not disposed to indulge in a forced and strained construction of the language of our own statute, in order to reach the conclusion that to enforce payment of a commercial note, in the hands of an innocent holder, which is not within the inhibition of the statute of the State where the note was executed and made payable, would be either opposed to public morals or violative of the policy or law of this State.

It appears from the complaint that the note came to the hands of the plaintiffs in the usual course of business, for value, without notice of any defect in the consideration. The contention that the firm of Miller Brothers is not bound because the paper was issued by one of the partners without the consent of the other, in a matter outside the scope of the partnership business, is, therefore, unavailing.

It is quite true that paper issued in fraud of the rights of the firm, by a member of a commercial partnership, upon a consideration outside of the scope of the firm business, while it remains in the hands of one affected with notice, or in whose hands it is subject to like defences as in the hands of the payee, is not enforceable against the partnership. *Irwin v. Williar, supra*; *Graves v. Kellenberger*, 51 Ind. 66.

When, however, a partnership is engaged in a course of business in which the use of commercial paper is appropriate, the firm is liable upon such paper, in the hands of a *bona fide* holder, issued in the firm name by one of its members, notwithstanding it may have been issued in violation of his duty by one of the firm without the knowledge or consent of the other members. *First Nat'l Bank, etc. v. Morgan*, 73 N. Y. 593; *Smith v. Collins*, 115 Mass. 388; *Lindley, Partnership*, 131.

These conclusions lead to a reversal of the judgment.

The judgment is accordingly reversed, with costs.

STATE CAPITAL BANK v. THOMPSON.

Supreme Court of New Hampshire, June, 1861. 42 N. H. 369.

For example, a negotiable promissory note delivered on Sunday is valid in the hands of an indorsee for value without notice.

ASSUMPSIT against the makers of a promissory note payable to order and indorsed by the payees to the plaintiff. Agreed facts: The note was not dated at first, but the date was afterwards inserted by the payees in accordance with agreement made when it was executed. The note, though written upon a week day, was signed and delivered to the payees on Sunday. The plaintiff bank discounted the note for value and without notice.

[Argument not reported.]

NESMITH, J. It is well settled that, as between the original parties to a promissory note, the defendant may show either the want of consideration or the illegality of it. In this State, under the construction of our statute prohibiting unnecessary labor on Sunday, the execution and delivery of a promissory note upon Sunday has been declared "business of a person's secular calling," and generally an act to the disturbance of others, and as such is prohibited under a penalty, and when subjected to it amounts to an implied prohibition of the act for which the penalty is inflicted. *Brackett v. Hoyt*, 28 N. H. 267; *Allen v. Deming*, 14 N. H. 133; *Smith v. Foster*, 41 N. H. 215. The case of *Allen v. Deming* was founded on a promissory note originally made on Sunday and indorsed to the plaintiff. The decision is based upon the ground that the plaintiff in this case could not be presumed to be or treated as an innocent indorsee. The fact is here found otherwise. It then becomes material to inquire how far the negotiable note in suit, having come in the ordinary course of business into the hands of a *bona fide* holder for a valuable consideration, and without notice of any defect in the same, can now be impeached in the hands of the present plaintiff.

We understand that the rule adopted and acted upon in England is, that when the legislature has declared that the illegality of the contract or the consideration shall make the note absolutely void, the defendant may set up that defence, though in the hands of a *bona fide* holder. But unless it has been so expressly declared by parliament, illegality of consideration will be no defence against a *bona fide* holder without notice and for a valuable consideration, or unless the note be obtained after it became due and payable. *Lowe v. Waller*, 2 Doug. 735; *Chitty on Bills*, 58, 104, and cases cited.

This rule is applied to cases affected by usury, and to such as come within the penalties of the statutes prohibiting gaming. We believe

the New York and Massachusetts courts adhere to the same rule. 3 Kent's Com. 44; *Valette v. Parker*, 6 Wend. 620; *Baker v. Arnold*, 3 Caines, 279; Story on Bills, 222; Bayley on Bills, 512-516. The same principle has been adopted in this State where the sale of spirituous liquors has been prohibited by penal enactment. In *Doe v. Burnham*, 31 N. H. 426, the defence was that the note in suit was given for spirituous liquors sold to the defendant by the payee of the note, contrary to the statute, etc. But it having been shown that the plaintiff, before the maturity of the note, took it on good consideration and without notice of any illegality in the consideration of the same, the defendant was refused the right to set up this defence. *Norris v. Langley*, 19 N. H. 423; *Great Falls Bank v. Farmington*, 41 N. H. 32. So also, where part of the consideration of the note is illegal, and the holder occupies the position of an innocent indorsee. *Clark v. Ricker*, 14 N. H. 44. But if the notes be taken when overdue or dishonored, the illegality of the consideration can be shown as matter of defence. *Ayer v. Hutchins*, 44 Mass. 370.

The statutes for the observance of the Lord's day and also for restraining the sale of spirituous liquors were doubtless both intended for the welfare and security of society and for the promotion and enforcement of good morals and right conduct in the community. The statutes are both penal in their character, and similar legal consequences should be made to attach to their violation. In the construction and application of these statutes to contracts made under them the court will apply like rules and exceptions. We agree to the conclusion of Justice Savage in *Valette v. Parker*, before referred to: "It is all important to the commercial world that courts do not go in advance of the legislature in rendering negotiable paper void in the hands of an innocent indorsee. Wherever the statutes declare notes void, they are and must be so in the hands of every holder; but where they are adjudged by the court to be so for failure or the illegality of consideration, they are void only in the hands of original parties or those who are chargeable with or have had notice of the illegality of the consideration therein contained." We also understand our conclusion to be in accordance with the recent decision of the court in the case of *Clark v. Pease*, 41 N. H. 414.¹

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Judgment for the plaintiff.

¹ *Ante*, p. 407.

BAXTER *v.* LITTLE.BAXTER *v.* HARRIS.

Supreme Court of Massachusetts, March, 1843. 6 Met. 7.

A set-off is not, essentially, an equity; but rights which existed in the defendant against the payee or prior holder while the paper was in the hands of such party, may be set off against a holder who takes after maturity.

THE first of these actions was by the indorsee against the maker of a promissory note for \$330, dated March 1, 1837, payable to Joseph Harris, Jr., in four months, and by him indorsed. The action was commenced October 4, 1839.

At the trial before the Chief Justice, the signatures of the maker and indorser were admitted by the defendant, and he relied upon a set-off of notes against the Franklin Bank, upon the ground that the note in suit was held by that bank, after it was due, and that he had a right to make the same defence against the plaintiff, as if the action were brought by the bank.

In order to present the question of law, it was mutually conceded that the note was discounted by the Franklin Bank, in the due course of business; that it was held by the bank, when it became due; that afterwards, and after the bank had stopped payment, in pursuance of a vote of the directors to pay the debts of the bank in such securities as they had, the note in question, on the 20th of December, 1837, was delivered to the plaintiff, or to the person under whom the plaintiff claims title, in exchange for bills of said bank, at par, which bills were then at a discount in the market; that before this action was brought — upon notice of the plaintiff's attorneys that they had such a note, and demanded payment thereof, but without notice to the defendant that the note had been transferred by the bank — the defendant tendered to said attorneys, in satisfaction of the note, bills of the Franklin Bank, which they declined to accept; that the defendant has ever since had said bills, and has filed them in offset in this action, and now relies upon that tender and set-off.

The second of these actions was by the indorsee against the indorser of the same note, and all the facts stated in the previous case were agreed to in this. The defendant further, in this case, relied upon a balance due to him from the Franklin Bank, by way of set-off to the note. And it was further agreed by the parties, that on the 5th of June, 1838, there was due to the defendant, on the books of said bank, a balance of \$293.63, and that he had no notice of the transfer of the note to the plaintiff, until this suit was commenced; that within a month or two after the 20th of December, 1837, when the note was passed out of the bank, notice was given to the defendant by the cashier, that it was so passed out; that the balance above men-

tioned, due to the defendant, on the 5th of June, 1839, arose from post notes deposited on that day, except \$12.88, which previously stood to his credit; and that the deposit then made cancelled all demands which the bank had against him, and left the above balance.

It was agreed in each case, that judgment should be entered for the plaintiff, if in the opinion of the court he was entitled to recover; otherwise, that the plaintiff should become nonsuit.

[Argument reported.]

SHAW, C. J. When a negotiable note is indorsed and transferred after it is due, and the defendant relies upon matter of set-off which he may have against the promisee, he can avail himself only of such matter of defence as existed between himself and the promisee, at the time of the actual indorsement and transfer of the note to the holder. A note does not cease to be negotiable because it is overdue. The promisee, by his indorsement, may still give a good title to the indorsee. Notes or other matters of set-off, acquired by the defendant against the promisee, after such transfer, cannot be given in evidence to such note, although the maker had no notice of such transfer, at the time of acquiring his demand against the promisee. Having made his promise negotiable, he is liable to any *bona fide* holder and actual indorsee; and therefore, even after the note has become due, in making payments to the original promisee, or in further dealings by which he gives him a credit, he has no right to presume, without proof, that the promisee is still the holder of the note. Besides, in case of payment of a negotiable note, or of a credit which the maker intends shall operate by way of payment, he has a right to have his note given up, if paid in full, or to see the payment indorsed, if partial. Should he insist on this right, in the case proposed, he would at once perceive that the person, to whom he is making payment or giving credit, is no longer the holder of the note. And this appears to us to be the true distinction between the indorsement of a note overdue, and the assignment of a *chose in action*. In the latter case, notice of the assignment must be given by the assignee to the debtor, to prevent him from making payment to the assignor. Without such notice, he has no reason to presume that the original creditor is not still his creditor; and payment to him is according to his contract and in the due and ordinary course of business. The assignee takes an equitable interest only, which must be enforced in the name of the assignor;¹ and, until notice, he has no equity against the debtor, which can be recognized and protected by a court of law or equity. The indorsee of a note overdue takes a legal title; but he takes it with notice on its face that it is discredited, and therefore subject to all payments, and offsets in the nature of payment.

¹ But see Rev. Laws of Mass., ch. 173, § 4.

The ground is, that by this fact he is put upon inquiry, and therefore he shall be bound by all existing facts, of which inquiry and true information would apprise him; but these could only apprise him of demands then acquired by the maker against the payee.

We are aware that in the marginal note to *Sargent v. Southgate*, 5 Pick. 312, which is the leading case on this subject, it is stated, that "in an action by the indorsee against the maker of a negotiable note indorsed when overdue, the defendant may file in set-off a negotiable note made to him by the payee before he had notice that the note in suit was assigned." And the point is so stated in *Minot's Digest*, 640. No such decision was called for, in that case, because all the demands, relied upon by way of set-off, were acquired by the defendant, whilst the original payee was holder of the note. But further; on a careful examination of the opinion, we think it will not be found that there is any such dictum in regard to notice. The inadvertence, in extracting the marginal note from the case, probably arose from the very obvious analogy between the case of the indorsement of a note overdue, and the assignment of a *chose in action*, especially as there was nothing in the facts or the argument to call for a distinction between the two cases. The opinion of the court in that case, therefore, is not an authority opposed to the ground of decision adopted in this, namely, that this right of set-off must be confined to those demands against the payee or prior holder, which accrued to the defendant, whilst such payee or prior holder was the actual holder of the note, and will not extend to demands which accrued afterwards, although no notice of the indorsement was given to the debtor.

The defendant Little, the maker of the note now in suit, not having shown that he held the bills of the Franklin Bank at the time that his note was transferred to the plaintiff, he cannot set them off, in this suit. In a case in New York, it was held that bills of a bank, held by the defendant when his note became due, could not be set off, in an action brought on the note by receivers appointed previously. *Haxtun v. Bishop*, 3 Wend. 13.

The English rule, in allowing set-off in an action upon a note, is somewhat more limited than our own, confining such defence to equities arising out of the same note, or transaction connected with it. *Burrough v. Moss*, 10 Barn. & Cress. 558. Here, it has been held, that an independent demand may be set off, where in other respects the party is entitled to go into that defence. *Sargent v. Southgate*, 5 Pick. 312; *Ranger v. Cary*, 1 Met. 375.

Since the decision in *Sargent v. Southgate*, the principle decided by it has been confirmed, and the whole subject of set-off placed, by the Rev. Sts. c. 96,¹ upon grounds more distinct and satisfactory than it was under the former statutes.

¹ Rev. Laws of Mass., ch. 174.

The principles already stated apply *a fortiori* to the case of Harris, the defendant in the second action, who was indorser of the same note. The note was transferred to the plaintiff by the Franklin Bank, in December, 1837, soon after which, the defendant had actual notice of it from the cashier; and it is found that the deposit to the credit of the defendant, upon which he relies by way of set-off, was made, and the credit obtained, in June, 1838. It is stated indeed, that prior to that time there was a small balance to his credit, on deposit, of \$12.88, but there were other demands of the bank, at that time, against the defendant, exceeding that deposit; so that the whole of the defendant's demand against the bank, offered in set-off, accrued subsequently to the transfer of the note, which is now in suit, to the plaintiff.

Judgment, in both cases, for the plaintiff.

NOTE. — Inasmuch as matter of set-off does not arise out of the transaction giving rise to the instrument, it is not, in the strict sense, an equity; statutes have, however, generally provided that, in a suit by the assignee of a *chose in action*, the defendant may set off against the plaintiff any claim which he had against the assignor. See Rev. Laws of Mass. ch. 174, §§ 1, 4. And where such statutes exist, it is generally held that the defendant may set off against the indorsee any claim which he had against the indorser at the time of transfer, where the transfer was made after maturity. *LaDue v. Bank of Kasson*, 31 Minn. 33; *Armstrong v. Chadwick*, 127 Mass. 156; *Tyler v. Boyce*, 135 Mass. 558; 2 Daniel, Neg. Inst., 5th ed., §§ 1435-1437.

MASSACHUSETTS NATIONAL BANK v. SNOW.

Supreme Court of Massachusetts, January, 1905. 187 Mass. 159; 72 N. E. Rep. 959.

In some jurisdictions, and by the Statute, the want of delivery of a complete instrument is but an equity, available only between the parties, or against a holder with notice.¹

ACTION by the holder against the maker of a promissory note.
The facts are stated in the opinion.

[Argument not reported.]

KNOWLTON, C. J. This is an action of contract on three promissory notes, signed H. G. & H. W. Stevens, payable to the order of the defendant, indorsed by him in blank, and discounted by the plaintiff. They severally bear date December 9, 1899, and the rights of the parties are accordingly governed by St. 1898, c. 533, sometimes called the negotiable instruments act, which is now embodied in Rev. Laws, c. 73, §§ 18-212, inclusive. In reference to different

¹ N. I. L. §§ 32, 33.

provisions of this statute it may be convenient to cite the sections of the Revised Laws, rather than the original act.

The maker of the notes, H. W. Stevens, who did business under the name of H. G. & H. W. Stevens, has deceased, and the defendant introduced evidence tending to show that, after the defendant had indorsed the notes, they were taken from his possession by the maker, without his knowledge or consent, and discounted at the plaintiff bank, and that they were altered by the insertion of the words "seven per cent" after the words "with interest." The defence is founded on this evidence. The defendant's counsel stated that he made no contention that the bank had actual knowledge of any infirmity in the instruments, or defect in the title to them, or that it took them in bad faith. Nor was it contended by the defendant that in discounting the notes the bank acted otherwise than in the regular and usual course of business. But upon the defendant's testimony it might be found that the notes were given to him by the maker in payment of indebtedness, that after he had indorsed them in blank, and put them in his desk for collection or discount, he was called out of his office, leaving the maker Stevens, there, and that Stevens then took them without right, and three days later carried them to the plaintiff bank and caused them to be discounted for his own benefit.

The plaintiff made many requests for rulings, which were refused, subject to its exception.

The notes, being indorsed in blank, were payable to bearer, within the meaning of the statute. Rev. Laws, c. 73, § 26 (5). When the notes were taken to the plaintiff for discount, Stevens was the bearer. Rev. Laws, c. 73, § 207. The presentation of such notes for discount raised a presumption of fact that the bearer was the owner of them. *Pettee v. Prout*, 3 Gray, 502, 63 Am. Dec. 778. Upon the undisputed evidence and upon the defendant's admission that the plaintiff took them in good faith, and discounted them without knowledge of any infirmity in them or defect of title in Stevens, the plaintiff became a holder in due course, within the definition of the statute. Rev. Laws, c. 73, §§ 69-76; *Boston Steel & Iron Company v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426. There was not even anything to put the plaintiff upon inquiry, for the rate of interest was the same that Stevens had been paying on his loans from the bank for two years. The uncontradicted evidence, as well as the defendant's admission, makes it plain that the plaintiff had no notice of any infirmity in the instruments, or defect in the title of Stevens, under the rule prescribed by the statute. Rev. Laws, c. 73, § 73. This rule, namely, that to constitute such notice, the person to whom the note is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action

in taking the instrument amounted to bad faith, is the same as prevailed in this Commonwealth before the enactment of the statute. *Smith v. Livingston*, 111 Mass. 342; *Lee v. Whitney*, 149 Mass. 447, 21 N. E. 948; *International Trust Co. v. Wilson*, 161 Mass. 80, 90, 36 N. E. 589.

The defendant's contention that after the notes had been delivered to the defendant and indorsed by him, they were stolen by Stevens, brings us to the question whether, under the negotiable instruments act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. *Wheeler v. Guild*, 20 Pick. 545, 550, 553, 32 Am. Dec. 231; *Worcester, etc. Bank v. Dorchester, etc. Bank*, 10 Cush. 488, 57 Am. Dec. 120; *Wyer v. Same*, 11 Cush. 51, 53, 59 Am. Dec. 137; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *London Joint Stock Bank v. Simmons*, 1892, App. Cas. 201, and cases cited; *Smith v. Bank*, 1 Q. B. D. 31; *Goodman v. Simonds*, 20 How. 343-365, 15 L. Ed. 934; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Hotchkiss v. National Shoe & Leather Bank*, 21 Wall. 354, 22 L. Ed. 645; *Kinyon v. Wohlford*, 17 Minn. 239 (Gil. 215), 10 Am. Rep. 165; *Clarke v. Johnson*, 54 Ill. 296; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583; *Evertson v. National Bank of Newport*, 66 N. Y. 14, 23 Am. Rep. 9; *Kuhns v. Gettysburg National Bank*, 68 Pa. St. 445.

The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course. "But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." Rev. Laws, c. 73, § 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course this rule does not apply to an instrument which is incomplete. But in reference to a complete negotiable promissory note, payable to bearer, it is a wholesome and salutary provision. See *Greaser v. Sugarman*, 76 N. Y. Supp. 922. Upon the defendant's statement and the counsel's theory of the case, the rule is applicable. The note was not only complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by him. Therefore the first sentence of Rev. Laws, c. 73, § 33, "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," was inapplicable.¹ The instrument had taken effect, and

¹ The argument here must be taken to mean, that, inasmuch as the instrument had been delivered for the purpose of giving effect thereto, the first clause of the sec-

was subsequently negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to become payable to bearer. Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise. We are of opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute.

There was also error in the instructions given as to the alleged alteration of the notes. By Rev. Laws, c. 73, § 141, it is provided that "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This language is directly applicable to the present case. See *Scholfield v. Earl of Londesborough*, 1894, 2 Q. B. 660, 1895, 1 Q. B. 536, 1896, A. C. 514; *Schwartz v. Wilmer*, 90 Md. 136-143, 44 Atl. 1059.

We understand that the instructions were given independently of any question of pleading, and we therefore do not deem it necessary to determine at this stage of the case, whether the plaintiff should amend its declaration by inserting counts upon the notes as they were before the alleged alteration, if it wishes to recover upon them as notes bearing interest at only six per cent. See *Mutual Loan Ass'n v. Lesser*, 78 N. Y. Supp. 629. Nor do we consider other questions which are not likely to arise upon a second trial.

Exceptions sustained.

BURSON v. HUNTINGTON.

Supreme Court of Michigan, October, 1870. 21 Mich. 415.

In other jurisdictions, by the unwritten law, want of delivery is deemed an absolute defence, available even against a *bona fide* holder.

ASSUMPSIT against the defendant as maker of a negotiable promissory note, payable to the order of A. N. Goldwood, and by him tion referred to need not be discussed, since it was not applicable to the facts. But it is apprehended that this clause makes no peculiar case. The Statute provides that "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. . . . But where the instrument is in the hands of a holder in due course a valid delivery by all parties prior to him so as to make them liable to him is conclusively presumed." And even in an action by a *bona fide* holder against the maker, the latter could not set up want of delivery, and the fact that the instrument had never been delivered for the purpose of giving effect thereto, could not be shown; the delivery is conclusively presumed. In this case, the suit was upon the indorser's contract, which, in fact, had never been delivered; the fact, however, could not be shown, because of the provision of the Statute, quoted *supra*. It was quite immaterial that another's contract, to wit, the maker's, had been delivered.

indorsed to the plaintiff for value, and, as certain disputed evidence tended to show, in good faith, without notice of the facts set up in defence. The note was made in negotiations with Goldwood for the purchase by the maker of an interest in a patent right.

The defendant made affidavit denying the delivery of the note,¹ affirming therein that the instrument sued upon "was never delivered by this defendant to the said A. N. Goldwood, mentioned in said written instrument, nor to any other person for the said A. N. Goldwood, or any other person, and that this defendant never authorized any other person to deliver the written instrument for him, this defendant to the said A. N. Goldwood, or to any other person; . . . that said written instrument was taken from the house of this defendant, in this defendant's absence from the same, by the said A. N. Goldwood, without the knowledge or consent of the deponent at the time." There was evidence tending to support this, for which see the opinion.

Counsel for the defendant asked for the following charge, in substance, to the jury: If they find that A. N. Goldwood, the payee, took this note after it was drawn and signed by the defendant without the knowledge and against the will and consent of the defendant, and before the defendant had delivered the note to any person, the note thus obtained would be void in the hands of Goldwood, and in the hands of any subsequent holder deriving possession from him, whether for value or not; and that the note, if not delivered by the defendant or by his authority, had no legal existence, and was therefore void.

The court declined to charge as thus requested, and under the charge given the jury found for the plaintiff. Writ of error by the defendant. [Facts foreign to the present purpose are omitted.]

[Argument reported.]

CHRISTIANCY, J.

But this note was indorsed by Goldwood, the payee, to the plaintiff, before maturity, for a valuable consideration, and, as plaintiff claims, in good faith and without notice of a want of delivery or of consideration, or any other circumstance tending to invalidate it in the hands of Goldwood; and his evidence tended to show this, though there was evidence of some circumstances tending to show that he had notice of the circumstances under which the paper had been obtained.

There was also evidence on the part of the defendant strongly tending to show that the note never was delivered by the defendant, but that Goldwood, to whose order it was drawn, was endeavoring to sell to the defendant a patent right, or the right of certain territory

¹ Under statute relating to denial of execution on oath.

under it, and that the parties had so far progressed towards the making of an arrangement to this end that it was understood and verbally agreed that Goldwood was to give him a deed of certain territory upon defendant's executing to him a note for the amount, with some other person signing it as surety. That the parties being in the defendant's house, and the defendant's sister being present, Goldwood wrote this note and defendant signed it; but as a surety was to be obtained, he laid the note on the table and went out to find his uncle for that purpose, telling Goldwood, as he went out, not to touch it till he came back; but that while defendant was gone Goldwood picked up the paper and started outdoors with it; that defendant's sister then told him to let the note be on the table till defendant should come back, to which Goldwood replied he was going to have the note, and went off with it, without giving any deed of territory or anything else for it. That the note, at this time, was not stamped,¹ and defendant never stamped or authorized it to be stamped; that some four days after, Goldwood wrote to defendant requesting him to come immediately to Kalamazoo "and sign stamp on the note," and saying if defendant was not there by Tuesday evening, "I shall consider that you refuse your signature, and shall act accordingly." The evidence also tended to show that defendant called upon Goldwood about that time, while the latter had the note, and demanded it, accusing him of stealing it, to which Goldwood replied, "Never mind, we can fix that up," and said he was ready to do as he had agreed, and wanted defendant to get another signer and he would give him a deed of territory; but defendant said he did not want the deed, but wanted the note. Goldwood refused to return the note, or to give a deed till he got another signer.

These facts, if found by the jury, would show, not only that the note was never delivered to the payee, and that it therefore never had a legal existence as a note between the original parties, but that there was yet no completed or binding agreement of any kind, and was not to be until defendant should choose to get a surety on the note and the payee should give him a deed of territory. Until thus completed, the defendant had a right to retract.

As a general rule a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. See *Edwards on B. and N.* 175, and authorities cited, and 1 *Para. on B. and N.* 48 and 49, and cases cited; and see *Thomas v. Watkins*, 16 *Wis.* 549; *Mahon v. Sawyer*, 18 *Ind.* 73; *Carter v. McClintock*, 29 *Mo.* 464. Delivery is an essential part of the making or execution of the note, and it takes effect only from delivery (for most purposes); and if this be subsequent to the date, it takes effect

¹ As was required at that time by act of Congress.

from the delivery and not from the date. 1 Pars. *ubi supra*. This is certainly true as between the original parties.

But negotiable paper differs from ordinary written contracts in this respect, that even a wrongful holder, between whom and the maker or indorser the note or indorsement would not be valid, may yet transfer to an innocent party, who takes it in good faith, without notice, and for value, a good title as against the maker or indorser. And the question in the present case is, how far this principle will dispense with delivery by the maker.

When a note payable to bearer, which has once become operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker and all indorsers on the paper when in the hands of the loser; and the loser must sustain the loss. In such a case there was a complete legal instrument; the maker is clearly liable to pay it to some one, and the question is only to whom. But in the case before us, where the note had never been delivered, and therefore had no legal inception or existence as a note, the question is whether he is liable to pay at all, even to an innocent holder for value.

The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note.

But it is urged that this case falls within the general principle, which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.¹ This is a principle of manifest justice when confined within its proper limits. But the principle, as a rule, has many exceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged can properly be said to have "enabled the third person to occasion the loss," within the meaning of the rule. If I leave my horse in the stable or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible to steal him from that particular locality. And upon examination it will be found that

¹ Bigelow, *Bills and Notes*, 204.

this rule or maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person whose acts or negligence have enabled such third person to occasion the loss;¹ and that the party has been held responsible for the acts of those in whom he had trusted upon grounds analogous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions by which the rights of others may be affected, has, as to the persons to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or *indicia* of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confidence is, as to those who have been deceived into parting with property or incurring obligations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearances.

Hence, to confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery, have no bearing upon the question. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily deliver it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to or discounted by a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions not apparent upon the face of the paper, and the person to whom it is thus intrusted violate the confidence reposed in him and put the note into circulation; this, though not a valid delivery as to the original parties, must, as between a *bona fide* holder for value and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder; or if the note be sent by mail and get into the wrong hands, as the party intended to deliver to some one, and selects his own mode of delivery, he must be responsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect if the note or indorsement were signed in blank, if the maker or indorser part with the possession or authorize a clerk or agent to do so, and it is done. 1 Parsons on Bills and Notes, 109-114, and cases cited, especially Putnam v. Sullivan, 4 Mass. 45,² which was decided expressly upon the ground of the confidence reposed in the third person, as to the filling up, and in the clerks as to the delivery.

And when the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee or others, and thereby

¹ Bigelow, Bills and Notes, 204, 206.

² Ante, p. 404.

induced to deliver or part with the note or indorsement, and the same is thus fraudulently obtained from him, he must doubtless, as between him and an innocent holder for value, bear the consequences of his own credulity and want of caution. He has placed a confidence in another, and by putting the papers into his hands has enabled him to appear as the owner and to deceive others. Cases of this kind are numerous; but they have no bearing upon the wrongful taking from the maker when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books, and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud; where it is laid down as a general rule that it is no defence for a maker, as against a *bona fide* holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not.

We do not assert that the general rule we are discussing — that “where one of two innocent parties must suffer,” etc. — must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up non-delivery; as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken.

The evidence tends to show that when he left the room in his own house, the note being on the table, and his sister remaining there, he did not confide it to the custody of the payee, but told him not to take it, and no final agreement between them had yet been made and no consideration given. Under such circumstances he can no more be said to have trusted it to the payee’s custody or confidence than that he trusted his spoons or other household goods to his custody or confidence; and there was no more apparent reason to suppose he would take and carry off the one than the other.

The maker therefore cannot be held responsible for any negligence; there was nothing to prove negligence, unless he was bound to suspect and treat as a knave, a thief, or a criminal the man who came to his house apparently on business, because he afterwards proved himself to be such. This, we think, would be preposterous. We therefore see no ground upon which the defendant could be held liable on a note thus obtained, even to a *bona fide* holder for value. He was guilty of no more negligence than the plaintiff who took the paper,

and the plaintiff shows no right or equities superior to those of the defendant.

Such, we think, must be the result upon principle. We have carefully examined the cases, English and American, and are satisfied there is no adjudged case in the English courts, so far as their reports have reached us, which would warrant a recovery in the present case. Some dicta may be found the general language of which might sustain the liability of the maker; such as that of Alderson, B., in *Marston v. Allen*, 8 Mees. & W. 494, cited by Duer, J., in *Gould v. Segee*, 5 Duer, 260, and that used by Williams, J., in *Ingham v. Primrose*, 7 C. B. n. s. 82. But a reference to the cases will show that no such question was involved, and that these remarks were wholly outside of the case. On the other hand *Hall v. Wilson*, 16 Barb. 548, 555, and 556, contains a dictum fully sustaining the views we have taken.

There are, however, two recent American cases where the note or indorsement was obtained without delivery under circumstances quite as wrongful as those in the present case, in one of which the maker, and in the other the indorser, was held liable to a *bona fide* holder for value. *Shipley v. Carroll*, 45 Ill. 285 (case of maker), and *Gould v. Segee*, 5 Duer, 260. But in neither of these cases can we discover that the court discussed or considered the real principle involved; and we have been unable to discover anything in the cases cited by the court to warrant the decision. It is possible that the case in Illinois may depend somewhat upon their statute, and the note being made as a mere matter of amusement, and the making not being justified by any legitimate pending business, the maker might perhaps justly be held responsible for a higher degree of diligence, and therefore more justly chargeable with negligence under the particular circumstances, than the maker in the present case.

There is another case (*Worcester Co. Bank v. Dorchester and Milton Bank*, 10 Cush. 488) where bank-bills were stolen from the vault of the bank, which, though signed and ready for use, had never yet been issued, and on which a *bona fide* holder for value was held entitled to recover. This, we are inclined to think, was correct. The court intimated a doubt whether the same rule should apply to bank-bills as to ordinary promissory notes, and as to the latter failed to make any distinction between the question of delivery and questions affecting the rights of the parties upon notes which have become effectual by delivery. But we think bank-bills, which circulate universally as cash, passing from hand to hand perhaps a hundred times a day, without such inquiries as are usual in the cases of ordinary promissory notes of individuals, stand upon quite different grounds. And considering the temptations to burglars and robbers, and the much greater facility of passing them off to innocent parties without detection and identification of the bills or the parties, and that the

special business of banks is dealing in and holding the custody of money and bank-bills, it is not unreasonable to hold them to a much higher degree of care, and to make them absolutely responsible for their safe keeping. We do not therefore regard this case as having any material bearing upon the case before us.

We think the Circuit Court erred in refusing to charge upon this point as requested by the defendant below.

[Concerning want of stamp and "other minor questions" not considered.]

The judgment must be reversed with costs, and a

New trial awarded.

WORRALL v. GHEEN.

Supreme Court of Pennsylvania, 1861. 39 Penn. State, 388.

If a negotiable instrument is materially altered after delivery, a *bona fide* holder may recover thereon, according to its original tenor.¹

ASSUMPSIT by the holder against the first indorser of a negotiable promissory note. The following special verdict was rendered:

"Charles M. Layman filled up a printed blank note in the following manner and in the following terms. The annexed is a correct copy as it was executed by him:

\$50.

OCTOBER 14, 1857.

Thirty days after date, I promise to pay to the order of *Levi A. Gheen*,
at the Bank of Chester County,
fifty ~~100~~ Dollars, without defalcation, for value received.

Credit the drawer,
LEVI A. GHEEN.

C. M. LAYMAN.

Layman called upon Gheen with the note, and requested him to indorse it. Gheen did so, by writing his name across the back of the note, and signed his name under the words 'Credit the drawer.' Layman then took the note away and fraudulently altered its amount from fifty dollars to one hundred and fifty dollars, by adding the figure '1' between the \$ and the figure '50,' and the words 'One hundred &' before the word 'fifty.'

The fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in ordinary business. On inspection a difference in the color of the ink with which the words 'One hundred &' were written may be perceived."

¹ N. I. L. § 141. Cf. *Holmes v. Trumper*, *post*, p. 444.

The plaintiff discounted the note before maturity for value and without knowledge of the alteration, and without notice thereof further than the foregoing facts indicate. Due steps were taken to fix the defendant's liability as indorser.

Judgment below ordered for the defendant; the plaintiff sued out a writ of error.

[Argument reported.]

LOWRIE, C. J. We are not able to follow the cases of *Pagan v. Wylie* and *Graham v. Gillespie*, Ross on Bills and Notes, 194, 195, in the principal point decided there. And yet we would not be understood as denying the case of *Young v. Grote* in the same book, p. 187, 4 Bing. 253. It may be that a cheque on a banker, so written as to be easily altered by the bearer of it, ought to be treated in the same manner as instructions sent by a principal to his agent, wherein the latter is not allowed to suffer from the carelessness of the former.¹ Thus probably alterations in cheques may be properly distinguished from those in bills, notes, and other contracts. We doubt it, however.

This is a case of a printed form of a promissory note, filled up by the maker, and then indorsed for his accommodation by another, and then altered by the maker to a larger sum by taking advantage of some vacant space left in the form. If the sum had been left entirely blank, the inference would have been that the parties authorized the holder as their agent in filling it in, and they would have been bound accordingly. But where a sum is actually written, we can make no such inference from the fact that there is room to write more. This fact shows carelessness; but it was not the carelessness of the indorser, but the forgery of the maker, that was the proximate cause that misled the holder. And we know not how we can say that a man be chargeable with a contract because he did not use proper precaution in guarding against forgery in any of the thousand forms it may take. We know of no way of saving purchasers of negotiable paper from the necessity and the consequences of relying on the character of the man they buy it from, if they do not take the trouble of inquiring of the original parties.

But this plaintiff had no hand in the alteration, and, as this is a case stated, we are not met by any discrepancy of *allegata* and *probata*, and therefore we can give judgment for the true amount of the note.² Ross on Bills and Notes, 201. This brings the case within the Hundred Dollar Act, and therefore the judgment must be without costs.

Judgment for plaintiff for \$60.37½.

¹ See *Scholfield v. Earl of Lonsborough*, post, pp. 452, 453.

² N. I. L. § 141.

ALDOUS v. CORNWELL.

Queen's Bench of England, Trinity, 1868. L. R. 3 Q. B. 573.

An alteration expressing only the effect in law of the instrument as it stood before is not a material alteration.¹

DECLARATION that the defendant, on the 8th of November, 1865, by his promissory note, promised to pay the plaintiff £125 on demand. Plea, that the defendant did not make the note as alleged.

At the trial the following promissory note, signed by the defendant, was put in evidence:

“NOVEMBER 8th, 1865.

On demand.

I promise to pay Mr. Ed. Aldous the sum of £125.”

But it was proved that the promissory note, when delivered to the plaintiff, did not contain the words “On demand,” and that these words had been inserted while the note was in the possession of the plaintiff, the payee, without the knowledge of the defendant, but there was no positive evidence to show by whom the alteration was made. The learned judge directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant, if the note was made void by the alteration. Rule obtained accordingly.

[Argument reported.]

LUSH, J. This was an action by the payee against the maker of a promissory note, expressed to be payable on demand. The plea denied the making of the note.

At the trial before the late Mr. Justice Shee it was proved that the words “on demand” were added after the note had been delivered to the plaintiff. It did not appear who made the alteration, but it was assumed to have been made by the plaintiff, and no question was raised as to this fact. The learned judge directed a verdict for the plaintiff, reserving the point whether by such an alteration the note was rendered void. No objection having been made to the pleadings, we must consider the case as if the question had been properly raised on the record.

It was admitted, and properly so, on the argument, that the addition of these words did not alter the legal effect of the instrument, but only expressed what the law would otherwise have implied. But it was contended, upon the authority of *Pigot's Case*, 11 Rep. 26 b, and *Master v. Miller*, 4 T. R. 320, 1 Sm. L. C. 796, that the alteration, having been made by the payee and holder, though in a matter not material, avoided the instrument.

¹ As to what alterations are material, see N. I. L. § 142; Bigelow, *Bills and Notes*, 207-210.

In *Pigot's Case* it is said, "If the obligee himself alters the deed by any of the said ways (viz. by interlineation, addition, erasing, or by drawing a pen through the line, etc.), although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed." For this proposition *Dyer*, 9 *Eliz.* fol. 261 *b*, is cited. *Shep. Touch.* vol. 1, p. 68, is to the same effect. It was found as a fact in *Pigot's Case* that the alteration, which was not a material one, was made by a stranger, and judgment was given for the plaintiff, so that the case itself is not a decision upon the point in question. *Master v. Miller* extended the doctrine, as regards material alterations, to bills of exchange; and subsequent cases have applied it indiscriminately to all written instruments, whether under seal or not. See *Davidson v. Cooper*, 11 *Mees. & W.* 778; in error, 13 *Mees. & W.* 343. No authority was cited, nor are we able to find one, in which the doctrine has been acted upon and an instrument held to be avoided by an immaterial alteration. There are cases to the contrary, though we cannot regard them as entirely satisfactory. Thus, in *Lord Darcy and Sharpe's Case*, 1 *Leon.*, an alteration in a bond not material, made by the executor of the obligee, was held not to vitiate the bond. But the court seemed to lay stress on the fact that the alteration was in favor of the obligor.

In *Sanderson v. Symonds*, 1 *Ball & B.* 426, the holder of a policy of insurance on a ship, on a voyage to the coast of Africa, during her stay there, and back to Liverpool, with liberty to "touch and stay at any port or places to sell, barter, and exchange, and load and unload and reload at any of the ports and places she may call at," had, fearing that these words might not be sufficiently extensive for his purpose, added after the words "during her stay" the words "to trade." Several of the underwriters had initialed the alteration, but the defendant refused to do so, on the ground that he never underwrote trading policies to Africa, and he offered before the loss to cancel his subscription and return the premium rather than assent to such an alteration. The plaintiff refused to accept this offer, and held to the policy. The ship was afterwards lost, and the plaintiff sued the defendant for his subscription; the defendant resisted the action on the ground that the alteration avoided the policy so far as he was concerned. It is to be observed here that both parties thought the alteration material at the time it was made. The court, however, held that the words so added expressed no more than was already contained in the policy as signed by the defendant, and therefore that the defendant was not discharged. This case might have been cited as conclusive upon the question before us but for the reasons assigned by the different members of the court for their judgment. *Dallas, C. J.*, said that the rule was intended not so much to guard against fraud as to insure the identity of the instrument and prevent the sub-

stitution of another without the privity of the party concerned. "But the present case," he said, "stands on its own circumstances. The instrument is a policy of insurance signed by a number of individuals wholly unconnected in interest, and between whom no privity can exist. Indeed, it has never been contended that this was an alteration without the privity of the party; and the old cases turn entirely on alteration made without the privity of the party. Here the instrument was shown to all the parties concerned. Those who put their initials to the alteration thereby expressly signified their consent to it; those who refused to do so expressed their denial by the absence of their initials. But the latter were bound by the policy as it stood at first, the former by the policy in its altered state." Park, J., said, "In all the cases on policies the court refers to the materiality of the alterations. The alteration here is immaterial; the risk stands as it stood before, and the writing immaterial words does not vacate the policy." And Burrough and Richardson, JJ., base their judgment on the fact that the risk was not varied by the alteration.

Had the alteration in that case been a material one, the fact that some of the underwriters had assented to it, and that it had been shown to those who refused¹ their assent, would not have prevented the operation of the rule as against the latter. This had been decided in two prior cases in the same court, *Langhorn v. Cologan*² and *Fairlie v. Christie*,³ in each of which the dissentient underwriters had been held to be discharged by a material alteration in the policy, though they had been asked to join others who had assented and had refused to do so. The judgment of Dallas, C. J., cannot therefore stand upon that ground, and it is obvious the real ground of the decision in *Sanderson v. Symonds* was that the defendant was not and could not be prejudiced by the alteration. Why the court should have limited the doctrine they there laid down to policies of insurance it is not easy to understand. We cannot discover any reason for making a distinction between that and any other species of contract.

Another case is that of *Catton v. Simpson*, 8 Ad. & E. 136; there the plaintiff had joined the defendant as his surety in a joint and several promissory note. The payee, having pressed the defendant for payment, had consented to give time on his procuring a third person to add his name to the note. The plaintiff, who had afterwards paid a moiety of the amount, sued the defendant for re-payment, and it was objected that, as the name of the third party had been added without the plaintiff's consent, he had been discharged and had paid the money in his own wrong. Patteson, J., who tried the cause, directed a verdict for the plaintiff; and the court refused a rule for a new trial, holding "that it was not an alteration of the

¹ Printed "expressed," but corrected in "Erratum" of the volume.

² 4 Taunt. 330.

³ 7 Taunt. 416.

note, but an addition which had no effect." It is true that in the subsequent case of *Gardner v. Walsh*, 5 El. & B. 83, this court expressly overruled *Catton v. Simpson*, not however on the ground that an immaterial alteration vacated the instrument, but on the ground that the alteration was a material one.

This being the state of the authorities, we think we are not bound by the doctrine in *Pigot's Case* or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one destroys the validity of the note. It seems to us repugnant to justice and common-sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written. We therefore discharge the rule.

Rule discharged.

BROWN v. REED.

Supreme Court of Pennsylvania, November, 1875. 79 Penn. State, 370.

But the *bona fide* holder may be entitled to recover on the instrument as altered, if the alteration was the result of the negligence of the promisor.

ASSUMPSIT by the holder against the maker of a promissory note in the following form:

NORTH EAST, April 3d, 1872.

Six months after date I promise to pay to J. B. Smith or
order Two Hundred and Fifty Dollars
for value received, with legal interest without
defalcation or stay of execution.

T. H. BROWN.

Endorsed: "J. B. SMITH, without recourse."

The plaintiff produced the note in evidence, and testified that he purchased it before maturity, in good faith, paying \$220 therefor.

The defendant offered to prove that he did not execute the instrument in the form now sued on; that he did enter into a contract with one J. B. Smith, to act as agent in selling "Hay and Harvest Grinders"; that the contract so executed was, in form, as follows:

NORTH EAST, April 3d, 1872.

Six months after date I promise to pay J. B. Smith or * bearer fifty dollars when I sell by
order Two Hundred and Fifty Dollars worth of Hay and Harvest Grinders,
for value received, with legal interest, without appeal, and also without
defalcation or stay of execution.

T. H. BROWN, * Agent for Hay and Harvest Grinders.

That, further, the contract had been altered since he signed it, by cutting it in such a way as to leave the instrument in suit.

[The instrument was cut on a line connecting the asterisks.]

The plaintiff objected to the admission of this evidence, on the ground that it would constitute no bar to his right to recover.

The evidence was excluded, and the judge ordered a verdict for the plaintiff. The defendant excepted to the exclusion of the evidence.

[Argument not reported.]

SHARSWOOD, J. The learned counsel for the plaintiff in error has appealed to us to reconsider and overrule *Phelan v. Moss*, 17 P. F. Smith, 59; and *Garrard v. Haddan*, 17 P. F. Smith, 82; since followed in *Zimmerman v. Rote*, 25 P. F. Smith, 188. We mean, however, to adhere to those cases, as founded both on reason and authority, and as settling a principle of the utmost importance in the law of negotiable securities. That principle is that, if the maker of a bill, note, or cheque issues it in such a condition that it may be easily altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business, before maturity. The maker ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skilful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skilful forgery of his handwriting. The principle to which I have adverted is well expressed in the opinion of the court in *Zimmerman v. Rote*, 25 P. F. Smith, 191: "It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them, with ease and without ready detection."¹

But would the facts offered to be given in evidence and rejected by the court below, have brought this case within the line of their decisions? We think not. In *Phelan v. Moss* and in *Zimmerman v. Rote*, the party signed a perfect promissory note, on the margin or underneath which was written a condition which as between the parties was a part of the contract and destroyed its negotiability. But it could easily be separated, leaving the note perfect, and no one would have any reason to suspect that it had ever existed. In *Garrard v. Haddan*, the note was executed with a blank, by which the amount might be increased, without any score to guard against such an alteration. In all these cases the defendants put their names to what were on their face promissory negotiable notes. In the case before us on the defendant's offer, he did not sign a promissory note, but a contract by which he was to become an agent for the sale of a

¹ But see *Holmes v. Trumper*, *post*, p. 444; and *Scholfeld v. Earl of Lonsborough*, *post*, p. 449.

washing machine. It was indeed so cunningly framed that it might be cut in two parts, one of which with the maker's name would then be a perfect negotiable note. Whether there was negligence in the maker was clearly a question of fact for the jury. The line of demarcation between the two parts might have been so clear and distinct and given the instrument so unusual an appearance as ought to have arrested the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the holder cannot avail him. The alteration was a forgery, and there was nothing to estop the maker from alleging and proving it. The ink of a writing may be extracted by a chemical process, so that it is impossible for any but an expert to detect it, but surely in such a case it cannot be pretended that the holder can rely upon his good faith and diligence. We think then that the evidence offered by the defendant below should have been received.

Judgment reversed and venire facias de novo awarded.

NOTE. — If this case can be reconciled with *Worrall v. Gheen*, *ante*, p. 437, it must be upon the ground that, in the latter case, there either was no negligence, or the negligence was not the proximate cause of the loss to the holder. If there was negligence in executing the contract in *Brown v. Reed*, that is, if the contract was drawn in such a way that a prudent man ought to have seen its unusual appearance, and refrained from signing it in that form, then there was something more than making forgery easy; this is not "facilitating alteration," but is making a contract by negligence. See *Scholfeld v. Earl of Londesborough*, *post*, p. 449, as to the doctrine of facilitating alteration.

HOLMES v. TRUMPER.

Supreme Court of Michigan, April, 1871. 22 Mich. 427.

It is not negligence, however, to leave blank spaces in the instrument, even though the alteration is facilitated thereby. In some jurisdictions, a material alteration destroys the instrument even in the hands of a *bona fide* holder.¹

THE case is stated in the opinion.

[Argument reported.]

CHRISTIANCY, J. This was an action brought by Holmes against Trumper upon a promissory note signed by the latter, which note was partly printed and partly in writing, a printed blank having been used. The following is a copy of the body of the note as it appeared upon the trial, the portions in italics being printed and the other portions written, viz.:

¹ See also *Wood v. Steele*, 6 Wall. 80. But see N. I. L. § 141.

"\$400.

One year after date I promise to pay to Lyman Terry or bearer, four hundred dollars, at the First National Bank of Ann Arbor, value received, with interest at 10 per cent. [signed] JACOB TRUMPER."

There was evidence on the part of the defendant tending to show that the note had been altered after it was made and delivered to the payee by adding, after the printed word "at," in the last line, the figures and words "10 per cent," and (as is to be fairly inferred from the whole record and the argument, though not expressly stated), that this alteration was made without the knowledge or consent of the maker.

It was conceded on the trial that the plaintiff was a *bona fide* holder of the note before due, and the only question in the case is whether the wrongful alteration of the note by the payee or any subsequent holder (for such was the only inference, there being no evidence showing by whom the alteration was made) rendered the note void in the hands of the plaintiff, or constituted a defence as against him in favor of the maker.

Without extrinsic evidence of authority to make the alteration, it is too clear to require the citation of authorities, that unless the note, *as signed*, can be treated as a note given in blank, so far as relates to the rate of interest, giving the payee or holder the right to fill the blank by inserting the rate, the alteration must be treated as a forgery, since it is one which, if valid, would enlarge the liability of the maker.

We are entirely satisfied that this note when signed without the addition of the words "10 per cent" was, notwithstanding the word "at," in legal effect, a complete and valid note, drawing the legal rate of interest at seven per cent; and that the word "at," at the end of the printed form, might readily be overlooked by the signer, or disregarded as of no consequence if noticed at all; and that there was, therefore, no such blank left in it as would warrant the payee or holder, without further evidence of assent, to insert a different rate of interest. See *Warrington v. Early*, 2 Ellis & Blackb. 763; *Waterman v. Vose*, 43 Maine, 504.

But in the case before us the insertion of the words "10 per cent," at the end of the note after the single printed word "at," can hardly be called the filling a blank at all; and though it is urged that leaving the printed word "at" at the close of the note was calculated to facilitate the forgery, by inducing in other parties the belief of the genuineness of the words added, yet it may be said with at least equal force, on the other hand, that to those looking at the note after the alteration critically enough to notice the printed word "at," the

printed form of the note itself might well excite suspicion that the form was specially got up by the payee to render the forgery more easy, and that the words "10 per cent," added at the end, were rather calculated to increase than to allay the suspicion of their genuineness; since, if the note was got up and printed only with the intention of leaving a blank for the insertion of the rate, the words, "per cent," might just as well, and much more naturally would have been, printed after a small blank following the word "at." Even the name of the payee was printed in the note. Would the payee, in honestly getting up such a note, have it printed without printing also the words "per cent," which would in all cases be the same, whatever the rate? These considerations are not conclusive, it is true, but they are not without weight.

We think the courts have gone quite far enough in sustaining instruments executed in blank, and the implied authority to fill them up, and we are not disposed to take a step in advance in that direction.

The counsel for the plaintiff in error fully admits the general rule, that an alteration having this effect thus to increase the maker's liability, renders the note void as against the maker, even in the hands of a *bona fide* holder for value.¹ But he insists that, though it may be a forgery, the peculiar facts of this case bring it within a principle which constitutes an exception to the general rule; that the maker was guilty of negligence in leaving a blank apparently intended for the insertion of the rate per cent unfilled, and without drawing a line through the blank or erasing the word "at," to indicate that it was not to be filled, and that he thereby invited and facilitated the forgery in a manner calculated to impose upon innocent parties, and that he must therefore, as between him and such innocent parties, be held to pay the note, in its altered form, in the same manner as if it had been originally so drawn, on the principle that, "where one of two innocent parties must suffer by the fault of a third, he shall sustain the loss who put it in the power of the third to occasion it"; or, as expressed by the Louisiana court, in *Isnard v. Torres et al.*, 10 La. An. 103: "Where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who, by his own act, has occasioned the confidence and consequent injury of the other."

This principle is one of quite general application, and where properly understood and limited, it is one of manifest equity; but it has many limitations and qualifications. Whether the present case falls within it or constitutes an exception is a question of some nicety, requiring considerable accuracy of discrimination for its solution, and upon unanimity of decision could perhaps hardly be expected; and we accordingly find that able courts have arrived at opposite conclusions upon it. But, upon principle and the weight

¹ But see *Worrall v. Gheen*, *ante*, p. 437; N. I. L. § 141.

of authority, we think the liability of the maker upon the note, as altered, cannot be maintained.

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As between the maker of commercial paper and an innocent party acting upon the faith of the paper, which the maker has voluntarily and intentionally executed and even negligently allowed to go out of his hands and to get into circulation, the general principle we are discussing would preclude such maker from showing that the paper was not intended to have the effect which its appearance indicated, though, as between the original parties, many things might be shown to defeat it. It is substantially a representation upon which he has authorized innocent parties to act; and when they have thus acted he must be held by the contract indicated by the representation thus made.

But this reasoning extends only to the paper as made and issued by him, or as he has thereby authorized some other person to change its terms; and the note in this case being a complete legal instrument when issued, to hold him bound by the contract, as altered by the forgery, involves the idea that the person committing the forgery was his agent in committing it (a ludicrous absurdity), or at least that he had authorized innocent third parties so to treat him.

Upon the hypothesis of the plaintiff in error which we are now considering, it is not claimed, nor in view of the facts as disclosed by the record can it be claimed, that the person making the alteration had any authority, nor that the maker had done or omitted anything to induce the belief, that he had authorized any subsequent holder to make it, nor that it was made by any person standing in any confidential relation to or held out as such by him. The whole argument goes upon the assumption that the plaintiff took the note in ignorance that any alteration had been made. The argument amounts simply to this: That by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word "at," and to draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way.

But how such a crime, whether committed in this or in any other way, could create a contract on the part of the maker we confess ourselves unable to comprehend; nor are we satisfied that a forgery committed in this way would be any less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or, as if an instrument

were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper, or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. The law has no scale by which to measure the various degrees of facility with which different modes of forgery may be committed, or their liability to suspicion or detection; and we see no clear and intelligible distinction by which we could hold the maker in this case bound by this forgery, which would not hold all persons liable for the alteration and forgery of any paper signed by them. Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders.

If promissory notes were only given by first-class business men who are skilful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of the people who are not thus skilful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper.

We have thus far considered the question involved as one of principle alone; and, though the authorities are not uniform, there is, we think, a very decided preponderance in favor of the conclusion at which we have arrived.

We see no ground upon which the defendant below could be held to pay the amount of the note, as originally drawn, at least when the action is brought upon the note itself, without departing from the whole theory upon which, at common law, the defence rests, which is that the paper, by the alteration or forgery, is rendered void, and does not constitute a contract in any respect.

There was no error in the ruling of the Circuit Court, and the judgment must be affirmed with costs.

The other justices concurred.

SCHOLFIELD v. EARL OF LONDESBOROUGH.

House of Lords of England, 1896. 1896, A. C. 514.

For example, the acceptor of a bill of exchange, is not negligent in accepting a complete bill which contains blank spaces which may easily be filled, thereby altering the instrument, and if the bill is altered after acceptance, a *bona fide* holder can recover only according to its original tenor.

THE case is stated in the opinion.

[Argument reported.]

LORD WATSON. My Lords, the appellant, who is the onerous holder of a bill of exchange purporting to be for £3500, seeks in this suit to recover that sum from the respondent.

The appellant brought an action against the respondent upon a bill of exchange purporting to be for £3500, payable three months after date. The bill was written out by Scott Sanders, the drawer, for the sum of £500, on a £2 stamp; and, in that condition, was presented by him to the respondent, who accepted it. After acceptance, the drawer fraudulently increased its amount by inserting the figure "3" between the letter "£" and the figures "500," in the corner of the bill, by writing the word "three" at the end of the second line, and by writing the word "thousand" at the beginning of the third line before the words "five hundred" in the body of the bill. It is now obvious that Scott Sanders, when he wrote the bill, must have had in contemplation the alterations which he subsequently made, and that he purposely used a stamp of unnecessary value, and left the spaces which he afterwards filled up as above described, in order to facilitate his fraud. The altered bill was indorsed by Scott Sanders to one Scott, from whom the appellant acquired it in good faith and for value. In his defence to the action, the respondent, while denying all liability, paid into court the original amount of £500.¹

[The judgment was for the defendant in the Court of Queen's Bench (1894, 2 Q. B. 660). This decision was affirmed by the majority of the Court of Appeal (Lord Esher, M. R., and Riggby, L. J., Lopes, L. J., dissenting) upon other grounds. [1895] 1 Q. B. 536. From these decisions the plaintiff brought the present appeal.]

The case was tried before Charles, J., upon the facts already stated, with these further admissions made by the appellant: (1) That the respondent was ignorant of bill transactions; (2) that he knew nothing about the stamp laws; and (3) that he had good

¹ See Bills of Exchange Act, § 64, 1.

reason to place implicit confidence in the honesty of Scott Sanders. With regard to the first and second of these admissions, I must observe that, in my opinion, ignorance of bill transactions or of the stamp laws will not, in a question with an onerous and *bona fide* holder, absolve persons who, notwithstanding their ignorance, choose to engage in such transactions from the fulfilment of any duty or obligation which the law imposes upon the parties to a bill of exchange. The reasonable belief of the respondent in the honesty of the person by whom the bill was drawn and presented to him for acceptance might, if he was under a legal duty to take precautions against its fraudulent alteration, be an element of importance in considering whether, as matter of fact, he acted negligently, as the appellant alleges.

The appellant did not maintain that the respondent either directly authorized, or meant to authorize, Scott Sanders to alter the amount of the bill. Nor did he maintain that the respondent had by his subsequent conduct homologated or adopted the alteration. He contended that the law merchant imposes upon every person who either draws or accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions, in order to prevent the possibility of its amount being fraudulently increased; that the respondent negligently failed to perform that duty, inasmuch as he accepted a bill written upon a stamp sufficient to cover the altered amount, and having spaces left blank in the writing which enabled the drawer to fill them up in such a manner as to effect and at the same time to conceal his fraud; and that, by reason of such negligence, the respondent is estopped from denying his liability for the full amount of £3500 appearing on the face of the bill.

Charles, J., who appears to have relied upon the authority of *Young v. Grote*, 4 Bing. 253, held in point of law that, if the acceptor of a bill of exchange "signs it negligently in such a shape as to render alteration a likely result, he is responsible on the altered instrument." Upon the facts of the case the learned judge came to the conclusion that the respondent had not been guilty of negligence; but in respect that the alteration of the bill was not apparent, he found that the appellant was entitled to the money which had been paid into court, and entered judgment for the respondent. His decision was affirmed, but not upon the same grounds, by a majority of the Court of Appeal. The Master of the Rolls and Rigby, L. J., were of opinion that, although the rule contended for by the appellant might prevail as between a customer and his banker, it was not applicable according to English law as between the acceptor of a bill of exchange and subsequent holders. Their Lordships were further of opinion that the rule, assuming it to have previously existed, was abolished by § 64 of the Bills of Exchange Act, 1882. Lopes, L. J., dissented, being of opinion that the principle of *Young*

v. Grote, 4 Bing. 253, applied as between the acceptor and an indorsee acquiring right to the bill after his acceptance; and his Lordship also, differing from Charles, J., held that the respondent had been negligent, and that the appellant ought, therefore, to have judgment for the full amount of the bill as fraudulently altered.

In these circumstances it becomes necessary to examine the authorities which were noticed by the learned judges or were cited in the able argument addressed to us on behalf of the appellant. Such of these authorities as really bear upon the doctrine propounded by the appellant are few in number. Of the rest, some have a very distant relation to it; whilst others are irrelevant.

The basis of the appellant's argument is to be found in *Young v. Grote*, 4 Bing. 253. In that case the customer of a bank signed several blank cheques and gave them to his wife, to be filled up and negotiated by her as she required. In one of these the sum of £50 was inserted, in her presence and at her request, by a clerk, to whom she then gave the cheque in order that he might get the money for her. In writing the sum the clerk had left spaces with fraudulent intent, so as to enable him to increase the amount to £350, which was paid to him by the banker. Best, C. J., and three other learned judges of the King's Bench held, in these circumstances, that the banker was entitled to take credit, in account with his customer, for the full amount which he had paid upon the cheque.

The doctrine laid down by Pothier (*Traite du Contrat de change*, Chap. IV., Art. III., § 99) was referred to with approval by some of the learned judges. In that passage the author deals with the mutual rights and obligations arising out of the contract of mandate which subsists between a banker and the mandant whose cheques or orders he has undertaken to pay. He notices the rule of the Roman Law, which had been followed by Scacchia, to the effect that "*mandator debet refundere mandatorio quicquid ei inculpabiliter abest ex causa mandati*." According to that rule, the customer would be liable for the amount of a fraudulently altered cheque in every case where the banker could not have detected the alteration by the exercise of reasonable care. Pothier qualifies the rule, and in so far favors the customer, by limiting his liability to those cases in which his own negligence in drawing the cheque has given the opportunity for its alteration.

The reported opinions of the learned judges leave it doubtful whether their decision in *Young v. Grote*, 4 Bing. 253, went upon the doctrine of Pothier, or upon the ground that the customer by signing a blank cheque had undertaken liability for any sum which might be filled in before it was presented for payment. I think the Lord Chancellor (Cranworth) must have had the first of these grounds in view when he said, in *Bank of Ireland v. Trustees of Evans's Charities*, 5 H. L. C. at p. 413: "Now, the case of *Young v.*

Grote, 4 Bing. 253, went upon that ground (whether correctly arrived at in point of fact is immaterial) that the plaintiff there was estopped from saying that he did not sign the cheque for £350; and if the circumstances are such, whether arising from negligence or from any other cause, that, as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that as between them is just the same as if he had signed it." On the other hand, Lord Wensleydale (then Parke, B.), when delivering the opinion of seven judges of the Exchequer Chamber in *Robarts v. Tucker*, 16 Q. B. 560, indicates that *Young v. Grote*, 4 Bing. 253, was decided upon the second ground. After referring to the facts of the case, he observed: "This was in truth considering that that customer had, by signing a blank cheque, given authority to the person in whose hands it was to fill up the cheque in whatever way the blank permitted."¹

Guardians of Halifax Union v. Wheelwright, L. R. 10 Ex. 183, appears to me to be a decision in entire conformity with the doctrine of Pothier. The guardians were in the habit of passing orders upon their treasurer, who was local agent of the bank in which their money was deposited. Some of these orders written by their clerk, and thereafter signed by the guardians, were drawn by the clerk in such a way that he was enabled to increase their amounts before he presented them for payment. The court held that the treasurer was in the same position as if he had been their banker; and that the guardians were estopped, by their negligent drawing of the orders, from maintaining that he had not their authority to pay the full amount of these orders, as fraudulently increased.

In my opinion, *Young v. Grote*, 4 Bing. 253, can have no bearing upon the present case, if it was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up to any subsequent holder. Whoever signs a cheque or accepts a bill in blank, and then puts in into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. No such inference would be reasonable in the case where the drawer or acceptor signs for a particular sum specified on the face of the document. If, on the other hand, the decision in *Young v. Grote*, 4 Bing. 253, was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to his banker by giving facilities for its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a bill of exchange and a holder acquiring right to it after acceptance. The duty of the customer arises directly out of the con-

¹ Cf. N. I. L. § 31.

tractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange.

The duty which the appellant's argument assigns to an acceptor is towards the public, or, what is much the same thing, towards those members of the public who may happen to acquire right to the bill, after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on any sound legal principle. In many if not most cases which occur in the course of business, the bill is written out by the drawer, and sent by him to the acceptor, who is under an obligation to sign it. Assuming the appellant's argument to be well founded, it would be within the right of the acceptor to return the bill unsigned, if it were not drawn so as to exclude all reasonable possibilities of fraud or forgery. The exercise of that right might lead to very serious complications in commercial transactions. Besides, it is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate; although there may be an exception in the case where one of the parties to the instrument has, either by express agreement or by implication established in the law, become bound to use such precautions. I am therefore unwilling in the case of an acceptor to affirm the doctrine upon which the appellant relies, unless it can be shown to be established by authority as part of the English law merchant.

I shall briefly refer to four decisions, because they were either cited in argument, or have been discussed, in this or similar cases by the courts below. All of these cases related to bills of exchange; but in none of them had there been any alteration of the amount for which the acceptor signed.

[After discussing briefly the cases of *Ingham v. Primrose*, 7 C. B. N. S. 82; *Arnold v. Cheque Bank*, 1 C. P. D. 579; and *Baxendale v. Bennett*, 3 Q. B. D. 525, his Lordship continued:]

I shall now proceed to consider the remaining and only English authorities which appear to me to be in point. Before doing so, I think it is not immaterial to observe that Pothier, who is the real author of the doctrine relied on by the appellant, in the passage cited by the learned judges who decided *Young v. Grote*, 4 Bing. 253, only applies it to the case of a banker and his customer. But in Art. III. of the same chapter of his treatise the learned author discusses the nature of the contract which is constituted between the drawer and the acceptor of a bill which he asserts to be "*un vrai contrat de mandat, mandatum solvendæ pecuniæ*." I think it is apparent from the context of Art. III., that the rule laid down by Pothier in § 99, was meant by him to apply not only as between banker and customer,

but as between a drawer and an acceptor who pays in compliance with his drawer's mandate. But the rule has no application to parties between whom there is no subsisting contract of mandate. According to its terms, an acceptor, who paid the full sum appearing upon the face of a bill which he knew or had reason to believe had been fraudulently increased after his acceptance, would have no right to recover the increased amount from his drawer.

It was argued that certain expressions used by Lord Blackburn (at that time Blackburn, J.) in *Swan v. North British Australasian Co.*, 2 H. & C. 175, 182, tend to show that the rule which Pothier applies to a customer who draws a cheque upon his banker has application also as between the acceptor of a bill and possible future holders. His Lordship there said, with reference to *Young v. Grote*, 4 Bing. 253, "It may be that the case is to be supported upon some of the grounds there stated, or upon the broader ground apparently supported by the authority of Pothier in the passage cited in *Young v. Grote*, 4 Bing. 253, that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary to inquire how that may be." Lopes, L. J., infers from these words that "it is impossible not to see that in the case of negotiable instruments Blackburn, J., thought the duty did exist." I am unable to assent to that inference. The words convey anything but a hearty approval of the decision in *Young v. Grote*, 4 Bing. 253, and at the most they do not even amount to *obiter dicta*. They contain no expression of judicial opinion, and do nothing more than state the tenor of an argument which the noble and learned Lord had not found it necessary to consider. One thing seems certain, namely, that his Lordship had not examined the text of Pothier, which contains no such doctrine as his words impute.

Several points were raised for the decision of the Court of Common Pleas in *Société Générale v. Metropolitan Bank, Limited*, 27 L. T. 849, and one of these came very near to the question which your Lordships have to consider in this case. The time of payment of a bill of exchange had, after issue, been fraudulently altered from eight to eighty days after date. The alteration being material, it was sought to make the indorser liable, upon the ground that he had negligently left a vacant space in the bill, between the words "eight" and "days," which enabled a fraudulent holder to add the letter "y" without risk of the fraud being detected upon inspection of the document. The court, consisting of Bovill, C. J., with Keating and Brett, JJ., came to the conclusion that the indorser was not liable. None of the learned judges affirmed that there was any duty incumbent upon the indorser to take precautions against forgery; but, on that assumption, they all held that there had been no negli-

gence. Two of them used language which does not appear to me to be consistent with the existence of such a duty. The Chief Justice observed: "Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, not the vigilance of parties in excluding all possibility of committing it." The present Master of the Rolls said: "I not only protest that there was no negligence, but say that no judge ought to leave to a jury that fact as evidence of negligence. But there is no duty on any one to suppose that those against whose character there is no imputation will commit forgery whenever the opportunity occurs."¹

The next and the last of the English authorities which raised the same questions of law and fact which occur in this appeal is *Adelphi Bank v. Edwards*, not reported, decided in the year 1882. The case has not been reported; but in the course of the argument your Lordships had the advantage of considering the shorthand writer's notes of the opinions delivered by the learned judges, both in the Court of First Instance and in the Court of Appeal. From these it appears that the defendant Edwards had accepted a bill for £22 10s., which was written on a stamp sufficient to cover £300. Spaces were left in the writing, which enabled a fraudulent holder to increase the amount of the bill to £222 10s. by inserting the figure "2" between the letter "£" and the figures "22" in the corner of the bill, and by adding the words "two hundred" at the end of one line, and the word "and" at the beginning of the next. The plaintiff bank, having paid the increased amount, sued the acceptor, upon the same arguments which have been submitted to your Lordships on behalf of the appellant.

Chitty, J., before whom the case was tried, was of opinion that, upon the law contended for by the plaintiff, the defendant had not been guilty of negligence. At the same time, the learned judge did not accept that law. He said: "The defendant, in my opinion, as a prudent man of business, was not bound to contemplate that the bill was coming into fraudulent hands, nor that by the perpetration of a crime it would be altered in the manner in which it has been altered."

In the Appeal Court, the learned judges took the same view of the facts as Chitty, J., but they also negatived the existence of any rule or principle requiring the acceptor of a bill to exclude facilities for its alteration. Baggallay, L. J., said: "It seems to me impossible to say that there was any duty on the part of the acceptor of this bill towards the party who might subsequently become the holder of the bill, so to criticise, and so to examine the bill before he signed, as to put it out of the possibility of any additional words being afterwards inserted in it." The present Master of the Rolls (then Brett, L. J.) stated forcibly the same opinions, which he has expressed in

¹ Cf. *Shepard Lumber Co. v. Eldridge*, 171 Mass. 516, 528.

stronger language and at greater length in this case. Lindley, L. J., after referring to *Young v. Grote*, 4 Bing. 253, and "that class of cases," proceeded thus: "We cannot say there was negligence here, unless we go the whole length of saying that it is negligence to sign a negotiable instrument so that somebody else can tamper with it. I cannot go that length. I think it would be wrong. There is no authority which compels us to do anything of the sort."

The result of the English authorities is, in my opinion, decidedly adverse to the appellant. Before the present action was brought, the rule for which he contends had, so far as I have been able to find, never been enforced in an English court or affirmed by an English judge. On the contrary, it had been disapproved by Bovill, C. J., and the present Master of the Rolls in *Société Générale v. Metropolitan Bank*, 27 L. T. 849; and the case of *Adelphi Bank v. Edwards*, not reported, in which four judges were unanimous, is a direct precedent against it. It is, no doubt, within the competency of this House to overrule the decision in *Adelphi Bank v. Edwards* (not reported), but I see no reason why your Lordships should do so. The doctrine of Pothier, out of which the contention of the billholder in this and previous litigations has grown, is founded upon reasons which have no application to any question between a drawer or acceptor and a holder acquiring right to the bill after acceptance; and I know of no principle of law which would warrant its extension to that case.

I desire to add that, had your Lordships thought fit to accept the legal argument of the appellant, I should not have been of opinion that the claim which he makes in this action was excluded by § 64 of the Bills of Exchange Act. That clause admits an action for the altered amount of the bill, when the acceptor has authorized the alteration. Accordingly, on the supposition already made, if it had been shown that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorize the fraud committed by Scott Sanders. That estoppel by negligence would, in my opinion, have been sufficient to establish that the respondent had "authorized" the fraudulent alteration within the meaning of § 64.

For these reasons, I also am of opinion that the judgment appealed from ought to be affirmed.

Order appealed from affirmed and appeal dismissed with costs.

NOTE. — See also *Greenfield Bank v. Stowell*, 128 Mass. 196; *Bigelow, Bills and Notes*, 277 *et seq.*

PATON v. COIT.

Supreme Court of Michigan, October, 1858. 5 Mich. 505.

There is a *prima facie* presumption that the holder is a holder in due course; but proof that the title of a prior party was defective because of fraud, duress, or illegality puts the burden upon the holder to show that he is a holder in due course.¹

ASSUMPSIT against the acceptors of a bill of exchange given for intoxicating liquors sold in violation of the Prohibitory Liquor Law, which makes such paper "utterly null and void against all persons, and in all cases, excepting only as against the holders, . . . who may have paid therefor a fair price, and received the same upon a valuable and fair consideration, without notice or knowledge of such illegal consideration." The plaintiffs were indorsees of the payees.

On the trial, the acceptance having been given in evidence, the plaintiff rested. The defendant then introduced a witness, and being required to state what he expected to prove by such witness, stated that he expected to prove that such acceptance was given in payment and as security for ten barrels of intoxicating liquor, called whiskey, purchased by defendant, of the drawers of said draft, on the thirtieth day of March, 1857, in Detroit.

The plaintiffs objected to such evidence, upon the ground that under the exception in section two of the Prohibitory Liquor Law of 1855, the presumption was that said draft was in the hands of *bona fide* holders, to wit, the plaintiffs; and that the *onus* was on the defendant to show, or propose to show, notice before said testimony could be received. The court sustained the objection, and refused to allow the testimony to be given; and defendant excepted.

Judgment having been rendered for plaintiffs below, for the amount of the acceptance, the defendant brought the case to this court by writ of error.

[Argument reported.]

CHRISTIANCY, J. Whether the evidence in this case was properly rejected, does not depend upon the question, Whether, standing alone, it would have constituted a complete defence against the draft in the hands of a *bona fide* holder for value; but, Whether it would have been sufficient to throw upon the plaintiff the burden of proving himself to be such *bona fide* holder; or, Whether, in fact, the evidence tended, *prima facie*, to establish a defence.

It is assumed by the counsel for the defendants in error (plaintiffs below) that the only effect of the statute in reference to negotiable paper given for liquors sold, "is to render such paper without consideration as between the immediate parties," and that "the

¹ N. I. L. §§ 76, 72.

effect of the exception in section two is simply to put this statute *equity* on a footing with all other equities, between the original parties to negotiable paper."

If this be the only effect of the statute, then, according to the prevailing current of recent decisions, the evidence was properly rejected, though the cases upon this point are by no means uniform; and we do not wish to be understood as giving any opinion upon the question presented by this hypothesis, as we do not think it involved in the present case.

The defence here proposed was not merely the *want*, but the *illegality* of consideration; and this being allowed as a defence between the original parties, irrespective of and even contrary to the equities of the parties, cannot, without perversion of language, be called an equity. It is not on the defendants' account that such a defence is allowed, as will more fully appear in the sequel.

The effect of the statute in question is not merely to render such paper without consideration, but absolutely *void and illegal*, between the immediate parties, and all others who have not obtained it for value, and without notice, — not only void in the negative sense of having no legal basis, but affirmatively illegal as violating the positive provisions of the statute. It was not even contended that the facts offered to be shown by the defendant would not have made a *prima facie* case of an illegal sale, without showing that the sale did not come within any of the exceptions of the statute; and if the plaintiffs claimed to maintain the validity of the sale under any such exception, the burden of proof (this being a civil case) rested upon them to bring it within the exception.

Now, upon principle, as a question of statute construction, and without reference to any authority, when the statute expressly declares all such paper void and illegal, and forbids any action to be brought or maintained upon it, "except when brought by a *bona fide* holder who has received the same upon a valuable and fair consideration without notice or knowledge," etc., it would seem to follow as a logical necessity, that when the paper is shown to have been given for such illegal consideration, the plaintiff's right of recovery is cut off by the general prohibition of the statute, unless, in avoidance of this, he gives evidence of those facts which alone can bring him within the exception.

We do not propose to give a definite opinion upon the point, whether, the illegality being first shown, the burden of proof in this case would have rested upon the plaintiffs to show actual want of notice; this might be requiring actual proof of a negative. But we are inclined to the opinion that they should have shown the nature of the transaction accompanying the transfer; and if that disclosed no suspicion of such notice, it might make a *prima facie* case of want of notice, and throw upon the defendant the burden of proving

notice. But the amount of the consideration given by the plaintiff is distinct from the question of notice, and the absence of such consideration, in such a case, would be a defence, though the paper had been taken by the plaintiff without notice. The amount of consideration given by the plaintiff is an affirmative fact peculiarly within his own knowledge, and not generally in that of the defendant, and being necessary to bring the plaintiff's case within the exception of the statute, should be proved by him. To allow him to recover without such proof would be an evasion of the statute. Such proof (the illegality being first shown) is a necessary part of the plaintiff's case, without which he shows no *prima facie* right to recover; and though, in ordinary cases, this fact would be presumed in favor of the holder, this presumption can never be allowed without proof when the paper was absolutely void between the original parties, on the ground of fraud, illegality, or duress.

This construction of the statute is sustained by authority. In England, by the statute of Anne, a note or bill given or indorsed upon a usurious consideration was void, even in the hands of a *bona fide* holder for value. Chitty, Bills, 9 Am. ed., 110. But the Stat. 58 Geo. III. c. 93 made such note valid in the hands of a *bona fide* holder for value without notice. In the case of Wyat v. Campbell, Mood. & M. 80, where the note had been indorsed by a previous indorser, upon a usurious consideration, and no notice given to plaintiff to prove consideration, it was contended that the plaintiff was not bound to prove it. But, by Lord Tenterden, C. J.: "The statute 58 Geo. III. c. 93 makes a note tainted with usury valid in the hands of a *bona fide* holder. The *onus* is, therefore, upon the holder to prove he is such, otherwise the statute does not apply, and the note is void under the statute of Anne."

In that case, it is true, the exception was in a subsequent statute; here it is in the same statute; but we are unable to perceive how this can make any difference as to the burden of proof. If the fact was not to be presumed in that case, it cannot be in this.

But whether this conclusion be right or wrong as depending purely upon a question of statute construction, can make little difference in this case. The rule as to the burden of proof is the same upon principle and authority at common law. Whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it *bona fide*, and gave value for it. Northam v. Latouche, 4 Car. & P. 140; Bailey v. Bidwell, 13 Mees. & W. 73; Harvey v. Towers, 6 Exch. 656; Smith v. Braine, 16 Q. B. 201; Fitch v. Jones, 32 Eng. Law & Eq. 134; Vallet v. Parker, 6 Wend. 615; Edwards, Bills, 686, 687; Chitty, Bills, 11th Am. ed. 661, 662; Story, Bills, § 193.

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The rule is the same as to the burden of proof, where it is shown that the paper was obtained by fraud or duress, and when stolen, or put in circulation by fraud. See authorities above cited, and *Mills v. Barber*, 1 Mees. & W. 425; *Holme v. Karsper*, 5 Binn. 469; *Aldrich v. Warren*, 16 Me. 465; *N. Y. & Va. State Stock Bank v. Gibson*, 5 Duer, 574. In fact, many of the cases, and most of the elementary works, place illegality in the same category with fraud or duress, as casting the burden of proof upon the holder.

But, while the result is the same, it is manifest that the basis of the rule in the case of illegality, though equally solid, is quite different. In the case of duress and fraud, as well as where the paper has been stolen, the *equities* of the defendant constitute the basis of the rule. But in the case of illegality of consideration, both parties are generally equally in fault; and it is not to protect the equities of the defendant, but on broad grounds of public policy, — to uphold the law, and to discourage its violation or evasion, — that the burden of proof is cast upon the plaintiff. It is as much the duty of courts to discourage the violation or evasion of law as to protect the equities of parties. And it is upon this principle only that the naked defence of illegality is allowed. See opinion of Lord Mansfield, in *Holman v. Johnson*, 1 Cowp. 341. And, upon this principle, courts should be careful to avoid doing anything to facilitate the enforcement of such contracts, unless it appear affirmatively that the plaintiff is not in fault, and that he has real equities to be protected.

The evidence offered was improperly rejected. The judgment must be reversed, and a

New trial granted.

All the justices concurred.

NOTE. — In *Clark v. Pease*, *ante*, p. 407, it was said, on the question of the burden of proof: "When the defendant had proved the duress, he had made a good defence as against the original party; and because of the legal presumption that in such cases, the payee being guilty of such illegality would dispose of the note and place it in the hands of some other person to sue upon it. . . . he had thereby cast a suspicion on the plaintiff's title which threw the burden upon him of showing affirmatively that he was a *bona fide* holder for value. Nor can we see that the fact, that this evidence was offered under the general issue, alters the position of the parties or the state of the case."

CHAPTER XII.

PAYMENT.

WHEELER v. GUILD.

Supreme Court of Massachusetts, October, 1838. 20 Pick. 545.

Payment by the maker before maturity, to the holder of a negotiable note not entitled to receive payment thereof, if not followed by surrender of the note, will not discharge the instrument.¹

THE case is stated in the opinion of the court.

[Argument reported.]

SHAW, C. J. The facts of this case present a very important question for the consideration of the court. Whatever affects the negotiability and the free currency of promissory notes and bills of exchange is of the utmost importance to a mercantile community, the business of which is to a great extent transacted through the medium of these instruments.

The facts which may be deemed material are these: The plaintiff became the holder of the note in question by regular indorsement for valuable consideration, soon after it was made, being a note dated September 1, 1833, payable in three years, with interest, and the last indorsement being in blank. Within a year from the date of the note, to wit, in March, 1834, the plaintiff, John Wheeler, as surety, joined with Daniel G. Wheeler in three promissory notes, one to Brigham & Goodrich, attorneys and partners, in Worcester, one to Tappan & Co., and one to Stewart & Co., of New York, for both of which parties Brigham & Goodrich were agents and attorneys. On that occasion, the plaintiff, John Wheeler, delivered to Brigham & Goodrich, as collateral security to his three joint and several promises, the note in question, indorsed in blank, and took their receipt, specifying that it was so received, and to be by them held, as collateral security for the payment of those notes. In September, 1835, these three notes had been fully paid. Though Brigham and Goodrich were in partnership as attorneys-at-law, yet Brigham was engaged in much other business, and had many separate negotiations, and the business

¹ N. I. L. § 136.

in question had been done in the partnership name, but in fact by Goodrich. In December, 1835, the plaintiff applied to Goodrich for the note, who then produced and exhibited it from a file of private papers, where it had been kept by him, and he would then have given it up to the plaintiff, but the plaintiff had not his receipt with him to exchange for it. In the mean time, before this application of the plaintiff to Goodrich, viz., on the 28th of November, 1835, Brigham had received of Stafford, one of the firm of A. H. Guild & Co., and one of the defendants, \$500 to pay the note in question, describing it as a note payable in September, 1836, and gave him a receipt, in his separate name, signed D. T. Brigham, stating that the \$500 had been received in full payment of the note, and the note to be delivered up to Stafford. Soon after the application of the plaintiff to Goodrich above stated, viz., about the 24th of December, Stafford, one of the defendants, producing Brigham's receipt, applied to Goodrich for the note, who declined giving it, on the ground that Brigham had no right to receive pay for and discharge the note; and by mutual consent it was placed in the custody of a gentleman, for the use of the party having the better title to it, by whom it was produced in this court on the trial.

Some inferences are to be drawn from this evidence, which may have a bearing on the case; but we think they are plainly deducible from the circumstances stated, and they are these: That Goodrich did not assent to the payment received by Brigham, and did not in fact know of it till after he had been applied to by the plaintiff for the note; that Goodrich had the actual possession and custody of the note; and that, at the time that Brigham received the money and gave the receipt, he not only did not produce or exhibit the note, but that he had not the actual custody of it, nor was it so amongst the partnership papers as that it was in the actual joint custody of the parties as partners. If he had it in his possession, or had regular access to it in the ordinary way of business, there is no reason why he did not deliver it up to Stafford, instead of giving him a receipt, and a promise to deliver it.

The law in regard to bills of exchange and promissory notes is so framed as to give confidence and security to those who receive them for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank, so as to be transferable by delivery; and in general a party taking such a bill under such circumstances has only to look to the credit of the parties to it, and the regularity and genuineness of the signature and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of business, his title is good, and he shall be entitled to receive the amount. *Miller v. Race*, 1 Burr. 452; *Peacock v. Rhodes*, 2 Doug.

633; *Grant v. Vaughan*, 3 Burr. 1516. The credit which the law thus attributes to notes and bills of exchange which are transferable by delivery arises mainly from the confidence inspired by the actual custody and possession, and the actual delivery of the security upon such negotiation. To so great an extent is this principle carried, that in regard to bank-notes, and in most respects in regard to all other bills and notes transferable by delivery, the title and the possession are considered to be inseparable. And it will be presumed that the party thus in possession of a bill holds it for value, until the contrary appears; and the burden of proof is on the party impeaching his title. *Collins v. Martin*, 1 Bos. & Pul. 648.

But these rules are adopted with this limitation, that the party thus taking the note or bill does it in the ordinary course of trade, when not overdue or otherwise dishonored by anything apparent upon the face of it, and without notice that it had been lost or stolen, or that the holder had obtained it wrongfully, or had no just right to receive it in the way of business. *Patterson v. Hardacre*, 4 Taunt. 114. If one takes a note or bill with actual notice that it has been lost by the owner, he cannot hold it against the true owner. *Lovell v. Martin*, 4 Taunt. 799.

It has been argued that where a party has a legal title by indorsement and delivery, and the actual possession of the bill or note, although he holds without any just right to negotiate or collect it, still, as he has a legal title, a transfer from him will vest a legal title in another, and authorize such other to take for his own use. But this consequence, we think, does not follow. The true ground is expressed by Eyre, C. J., in the case above cited, *Collins v. Martin*. . . . The same reasoning applies to other cases, where a party has the custody of a bill, without any just right or lawful authority to collect or negotiate it, as where it has been lost or stolen, or embezzled from the true owner, or intrusted to an agent, for a special purpose only; if these facts are known to the party receiving it, he is in privity with the party from whom he receives it, and cannot be heard in a court of justice, though having a legal title to enforce an inequitable and unjust demand. Such a case is not within the reason of the rule, which is designed only to protect bills and notes when taken in good faith, in the course of business. If a note is paid, not in the usual course of business, or to a person having the custody, but not authorized to receive payment, and that known to the party paying, though the note be given up, it is no discharge against the true owner. *Kingman v. Pierce*, 17 Mass. 247.

So payment of a bill or cheque, before it is due, will not be a discharge unless made to the real proprietor of it; and therefore where a banker, contrary to usage, paid a cheque the day before it bore date, which had been lost by the payee, it was held that he was liable to repay the amount to the person losing it. *Da Silva v. Fuller*, Sel.

Cas. 238, cited in Chitty, Bills, 6th Eng. ed. 148. In this case, although the holder had the legal title arising from the possession of the cheque, yet he was not *bona fide* the holder with authority to collect, and, as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it.

Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases are these: Where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title, and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer it; otherwise he shall not be deemed to have a good title to hold and enforce payment of it or to withhold the bill itself or the proceeds of it from the party justly entitled. *Bleaden v. Charles*, 7 Bing. 246. The same rule applies to payments: if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But in both cases faith is given to the holder mainly on the ground of his possession of the bill, ready to be surrendered or delivered, and the actual surrender and delivery of it upon the payment or transfer. If, therefore, upon such payment, the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment; and if it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but will be a payment in his own wrong; he must pay the bill again to the right owner, and must seek his redress against the party receiving his money, on the pretence that he had a right to receive it as the holder of the bill, when in fact he had no such right.

Applying these principles to the present case, the court are of opinion that the payment made by Stafford to Brigham, under the circumstances, did not operate as a payment and discharge of this note, and that the plaintiff is entitled to recover.

The plaintiff was the holder of this note by indorsement, before it was pledged to Brigham & Goodrich, and had the complete legal and equitable title to it, and the whole beneficial interest in it. Being transferable by delivery, when transferred to Brigham & Goodrich,

they took the legal title, with a right to collect it, and apply the proceeds to the payment of the notes, for the security of which it was pledged, if they should not be otherwise paid. But when those notes were paid, all right of Brigham & Goodrich to transfer or collect it ceased, and they had the mere naked possession of it for the plaintiff, to be surrendered on demand. Now whatever might have been the effect of an actual surrender and delivery of this note to one of the promisors, on receiving payment, it is very clear that, according to all the rules applicable to this subject, without surrendering and delivering up the note, the payment must be considered as made at the risk of the party paying; and, as the party receiving in fact had no right to receive payment, such payment and receipt did not discharge the note, as against the true owner. It is not necessary to consider whether Brigham was acting in his partnership capacity or not; because, after the purpose was accomplished for which the note was pledged to the partners, they had no just right or lawful authority to transfer or collect the note as against the plaintiff. If they had jointly transferred it in the due course of business, although their transferee without notice might have held it, it would be in virtue of the law which protects such transfers to a party without notice, in order to give effect to the currency of bills and notes, and not because Brigham & Goodrich had any right or lawful authority. If therefore they had given a transfer in writing with a promise to deliver the note, not delivering or producing it, no title would have passed as against the plaintiff, because such transfer without delivery would not be within the reason or principle of the rule.

But we think the other point is equally decisive. Brigham not only did not produce or exhibit the note, but he had not the actual custody or possession of it. He did not profess to act for the partnership, but signed the receipt in his own name. Had Brigham and Goodrich, as partners, been the true holders of the note, or if they had had a joint authority to collect it, it may well be admitted that the act of one or the receipt of one would bind both. But all the right and authority which they ever had over the note, except to give it back to the plaintiff, agreeably to their contract, had ceased. A receipt of one therefore in his own name, and not purporting to be for the use of both, was not within the scope of the partnership authority, and did not bind his partner. The defendant Stafford gave credit to Brigham only. For though his receipt purports to be not merely executory, but a present discharge of the note, yet as he had no authority to discharge it, either by himself, or for himself and partner, and as he had not the note to surrender and give up, the legal effect and operation of his receipt was an executory undertaking that he would procure a discharge of the note and surrender it. The consequence is, that Stafford paid his money to the wrong person, and must look to him for an indemnity.

Besides, the note was not paid in the due course of business.¹ It was paid many months before it was due; the full sum was not paid, there being more than two years' interest due on the notes, which was wholly relinquished; no notice was given to Goodrich, the partner who transacted the business of taking these notes, and giving the receipt for them, and who had the actual custody of this note, all of which would be strong evidence to go to a jury, to establish the fact of constructive notice to Stafford that Brigham had no right, either in his own name or as a partner with Goodrich, to receive payment of, or to discharge this note. But the other grounds are sufficient, without relying upon these circumstances.

The grounds upon which the court place their judgment are these: The plaintiff had once a good title to the note. It was delivered to Brigham & Goodrich, for a special purpose, which was accomplished. After that, Brigham & Goodrich had a mere naked custody of the note for the plaintiff and had no right or lawful authority either to negotiate or collect it; *a fortiori*, Brigham alone had no such authority. The defendant, Stafford, was not lawfully called upon to pay Brigham, as having the possession and custody with a *prima facie* title, because he had no such custody or possession, and the note was not due. Stafford was not deceived into taking the note by the production and delivery of it, because it was not delivered or produced; if he paid it therefore to Brigham, without having [taken] up his note, he did it on the faith that Brigham had good right to receive payment and discharge it, and of course under the liability to pay it over again to the rightful proprietor, if Brigham had not such right. In fact and law, Brigham had no such right, but the plaintiff was at the time the rightful proprietor, and of course the defendants obtained no discharge by such payment, but upon the maturity of the note they were bound to pay it to the plaintiff. The note having been put by Mr. Goodrich into the hands of a common friend, for the use of the party entitled, and the plaintiff having shown himself entitled, the note was rightly brought in by the person to whom it was thus intrusted, as evidence for the plaintiff.

Judgment for plaintiff.

MADISON SQUARE BANK v. PIERCE.

Court of Appeals of New York, March, 1893. 187 N. Y. 444; 33 N. E. Rep. 557.

Payment by a party secondarily liable does not discharge the instrument;² and part payment by such a party cannot be set up as a defence by the principal debtor, unless such payment was made on his behalf.

ACTION against the maker of a negotiable promissory note. Payment in part, by an indorser, set up in defence *pro tanto*. Judgment

¹ Cf. N. I. L. § 136, 1; id. § 105.

² N. I. L. § 138.

for the plaintiff, for the whole sum. The facts are stated in the opinion of the court, second paragraph.

[Argument reported.]

FINCH, J. We have a novel and interesting question before us on this appeal, although its apparent importance will lessen as we pass from first impressions to some slower reflection. It arises upon facts which are very brief and simple, and may at once be stated.

The defendant Pierce made his promissory note payable to his own order and indorsed it to the Bates Co., Limited, which indorsed it to the plaintiff bank; the latter discounting and paying the proceeds over to the immediate indorser. Thereafter the Bates Co. became insolvent and passed into the hands of a receiver, who paid to the bank, upon the liability of the indorser, seventy-three and one-quarter per cent. of the amount secured by the note. Later the bank sued Pierce the maker, and recovered judgment for the full amount of the note in spite of the proof showing the payment made by the receiver, and in disregard of the claim asserted by the defendant that he should only be held liable for the balance remaining unpaid. That judgment has been affirmed by the General Term, Judges Daniels and Barrett each writing very strong and valuable opinions in support of their doctrine, and relying upon the authority of *Jones v. Broadhurst*, 9 C. B. 173, 67 Eng. Com. L. 175, which fully warrants their conclusion. The question does not seem ever before to have arisen in this country, and we are left at liberty to examine the English rule and to follow it or not as we approve or disapprove its logic and its consequences.

We are not to regard the note as being accommodation paper, but must assume its transfer for value. The form of the transaction is equivalent to what it would have been if the Bates Co. had been named as payee, and loses none of its force by the intervention of the maker as first indorser. That indorsement, in the form adopted, was needed for the regular transfer of title, but does not change or affect the nature and character of the maker's liability. He remains the ultimate debtor, the person who ought to pay the debt, in preference to and in exoneration of all the other parties to the paper, who in some form or other are entitled to have final recourse to him. And it is to the case of such a maker of the note or such an acceptor of the bill of exchange that the English rule alone applies, and it is explicitly declared inapplicable where the indorser or drawer is the real debtor, although in form only secondarily liable.¹

Pierce therefore was the ultimate debtor, and the party who ought to pay the note, both in discharge of the obligation to the holder and in exoneration of the indorser. When the bank sued on the note, it

¹ Cf. N. I. L. § 136, 2; § 138, 2.

was the legal holder and the legal party in interest. Upon production of the paper and the usual proof, judgment against the maker for the full amount was inevitable, unless some defence should be interposed. The only possible one for Pierce was part payment, and he was compelled to assert, and his counsel are compelled to argue, that the money paid by the indorser to the holder inured to the benefit of the maker as a payment on his debt. But that doctrine cannot prevail for very obvious reasons. The indorser's payment did not in the least lessen or satisfy the maker's debt. He owed it all exactly as before. What had happened possibly changed somewhat the real creditor, but left the whole amount due and unpaid. To whom he should pay might become a new question, but how much he should pay in discharge of the note was not made doubtful in any degree. What the receiver advanced to the holder is familiarly described as payment; but it was such relatively to the indorser's liability alone; while relatively to the obligation of the maker it was an equitable purchase instead of a payment.¹ That view of it was taken in a very early case, the decision of which depended necessarily upon it. *Callow v. Lawrence*, 3 Maule & S. 95. . . . To the extent of the money paid the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes *pro tanto* the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due to the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership.

In the present case there was no privity between maker and indorser as it respects the action of the latter. He paid, not as the agent of the maker, not at his request, not for his benefit, and under no duty to relieve him, but independently, upon his own obligation, to lessen his own responsibility, and not at all to discharge the ultimate debt which it was the maker's duty to pay. It seems very clear, therefore, that the maker cannot utilize for his own benefit a payment which, as to him, is not a payment upon the debt. It becomes, as I have said, merely a question to whom he shall pay and who may sue for and collect the whole unpaid sum. In that question the maker has no concern beyond the inquiry whether he may become liable to different persons for the same debt and encounter the danger of paying it twice. I can discover no such peril. The judgment in favor of the holder is a bar to any other suit on the same note, and payment to the holder discharges the note utterly. Ordinarily the indorser cannot recover except upon the note, and as holder, and in accordance with the law merchant. If he ever has any other right of action against the maker, it is either in equity

¹ Cf. N. L. L. § 138.

or by force of some facts beyond the bare relation established by the paper. And where the note is merged in the holder's judgment, or paid in full to him by the maker, the indorser's only right is through the judgment or against the proceeds if he has made a partial payment to the holder. That does the indorser no wrong. If he is not content that the holder shall collect to some extent as his trustee, he may prevent it by payment in full to the holder and so entitle himself to the possession of the note on which to sue, or, if judgment has been obtained, to be subrogated to all of the rights of the plaintiff therein.

I think this result is clearly indicated by our own decisions. [*Mechanics' Bank v. Hazard*, 13 Johns. 353; and *Guernsey v. Burns*, 25 Wend. 411, discussed.]

It thus becomes apparent that there is no very great importance in the question which method of securing payment from the maker is adopted, since the same result follows from each, and that it narrows down to the inquiry whether as matter of correct doctrine and of convenience in practice the holder may recover the whole debt against maker or acceptor for himself and as trustee for the indorser to the extent of his acquired interest; or whether he shall take judgment only for the balance, leaving the indorser to sue in some way and on some theory, which apparently could not be upon the note because already merged in the judgment, but might be for money paid for the use of the maker, since he gets the benefit of it in the reduction of the judgment, as was held in *Pownall v. Ferrand*, 6 Barn. & C. 439, where the holder deducted the indorser's payment from the levy against the maker. The former seems to me to be the logical and convenient method, and so I think we should follow the English doctrine.

I have not underrated the assault made upon it by the appellant. He asserts that *Jones v. Broadhurst* is contrary to the earlier cases, and has been criticised and shaken by the later ones. I have examined them all, with some wonder at the amount of learning and ingenuity expended upon the subject. *Pierson v. Dunlop*, Cowp. 571; *Walwyn v. St. Quentin*, 1 Bos. & P. 652; *Bacon v. Searles*, 1 H. Bl. 88; *Hemming v. Brook*, Car. & M. 57; *Randall v. Moon*, 12 C. B. 261; *Cook v. Lister*, 13 C. B. N. S. 543; *Solomon v. Davis*, 1 Cahabe & Ellis, 83; *Thornton v. Maynard*, L. R. 10 C. P. 695. The prior cases were very fully and carefully reviewed by Baron Cresswell,¹ in the opinion rendered in *Jones v. Broadhurst*; and of the subsequent cases I deem it only necessary to say that along with some criticism and doubt, the doctrine has remained substantially unshaken, and the case last cited was declared by Lord Coleridge to be the accepted law.

¹ A slip for Cresswell, J.

It must not be forgotten, however, and I may prudently repeat, that the doctrine has no application to accommodation paper, and rests wholly upon the actual and ultimate indebtedness of maker or acceptor as the party who ought to pay. In such a case as that, which correctly describes the one now before us, and where no disturbing facts affect the relations of the parties as fixed by the paper itself, I think the holder may sue and recover the full amount, receiving so much of the proceeds as represents a part payment by the indorser, as trustee for him.

It follows that the judgment should be affirmed with costs.

All concur, except MAYNARD, J., dissenting.

Judgment affirmed.

SHAW v. KNOX.

Supreme Court of Massachusetts, November, 1867. 98 Mass. 214.

A party secondarily liable, on paying the instrument and taking it up, may enforce it against prior parties, or again negotiate it.¹

CONTRACT on a draft by Nathaniel Heath on John W. West for payment of \$450, three months after date to the order of the defendant, indorsed by the latter and bearing also, below the defendant's indorsement, the indorsement of E. Longfellow & Son.

Trial in the Superior Court, without a jury, when it appeared that the draft was drawn on the day of its date, and indorsed by the defendant, and then at his request by E. Longfellow & Son, "so that it could be discounted" (neither of the indorsers receiving any consideration therefor), and then was negotiated, and discounted by a bank, and presented for acceptance; that it was accepted by West, but on maturity was protested for non-payment; and that E. Longfellow & Son some months later paid it to the bank and took it up, and afterwards sold it to the plaintiff.

The defendant asked the judge to rule "that E. Longfellow & Son and the defendant were joint accommodation indorsers, and, when the former paid the draft, its negotiability was destroyed, and they could not pass it to the plaintiff so that he could maintain an action thereon." But he declined so to rule, and ruled that the plaintiff could maintain his action, and found for the plaintiff; and the defendant alleged exceptions.

[Argument not reported.]

BIGELOW, C. J. There was no joint liability on the part of the defendant with the subsequent indorsers. The indorsers on the draft

¹ N. I. L. § 138.

were all liable to the holders of the draft for value on their several contracts of indorsement. There was no agreement between the parties, when the draft was made and indorsed, that they should hold any other relation towards each other than that which would result from their being successive indorsers on the draft for the accommodation of the drawer.¹ If the last indorser paid the draft to the holder for value, he would succeed to the right of such holder, and could look to his prior indorser for payment of the amount paid by him. *Guild v. Eager*, 17 Mass. 615. Such payment was in fact made by the second indorsers, from whom the plaintiff derives his title to the draft. The relations of the parties to the draft can in no sense be regarded as creating a contract of joint guaranty and suretyship. The rights and duties of the several parties to an accommodation note or bill of exchange are the same in all respects as upon notes given for value. The legal effect of the contract into which they respectively enter by becoming parties to negotiable paper is that which appears on the face of the bill or note. It follows that, if an accommodation indorser is obliged to take up the draft in the hands of a holder for value, he can look to his prior indorser for payment. *Church v. Barlow*, 9 Pick. 547; *Clapp v. Rice*, 13 Gray, 403; *Howe v. Merrill*, 5 Cush. 80.

Exceptions overruled.

¹ Cf. N. I. L. § 85.

NEGOTIABLE INSTRUMENTS LAW.

[REVISED LAWS OF MASSACHUSETTS, VOLUME I.
CHAPTER 73.]

NEGOTIABLE INSTRUMENTS, IN GENERAL.

Form and Interpretation.

SECTION 18. An instrument to be negotiable must conform to the following requirements:—

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty.

SECT. 19. The sum payable is a sum certain within the meaning of sections eighteen to two hundred and twelve, inclusive, although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that, upon default in payment of any instalment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at a current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

SECT. 20. An unqualified order or promise to pay is unconditional within the meaning of sections eighteen to two hundred and twelve, inclusive, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay only out of a particular fund is not unconditional.

SECT. 21. An instrument is payable at a determinable future time, within the meaning of sections eighteen to two hundred and twelve, inclusive, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening is uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

SECT. 22. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument is not paid at maturity; or
2. Authorizes a confession of judgment if the instrument is not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

SECT. 23. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

SECT. 24. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed, when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

SECT. 25. The instrument is payable to order where it is drawn

payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

SECT. 26. The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

SECT. 27. The instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

SECT. 28. Where the instrument or an acceptance or any indorsement thereon is dated such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or indorsement, as the case may be.

SECT. 29. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

SECT. 30. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date.

SECT. 31. Where the instrument is wanting in any material particular the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature, in order that the paper may be converted into a negotiable instrument, operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its

completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given, and within a reasonable time.

SECT. 32. Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

SECT. 33. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. Where the instrument is no longer in the possession of a party whose signature appears thereon a valid and intentional delivery by him is presumed until the contrary is proved.

SECT. 34. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain reference may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay"

is signed by two or more persons they are deemed to be jointly and severally liable thereon.

SECT. 35. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

SECT. 36. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

SECT. 37. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability.

SECT. 38. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

SECT. 39. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

SECT. 40. Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

Consideration.

SECT. 41. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

SECT. 42. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.

SECT. 43. Where value has at any time been given for the instrument the holder is deemed a holder for the value in respect to all parties who became such prior to that time.

SECT. 44. Where the holder has a lien on the instrument, arising

either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

SECT. 45. Absence or failure of consideration is matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

SECT. 46. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Negotiation.

SECT. 47. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

SECT. 48. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser without additional words, is a sufficient indorsement.

SECT. 49. The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue.

SECT. 50. An indorsement may be either special or in blank; and it may also be either restrictive, or qualified, or conditional.

SECT. 51. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank does not specify any indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.

SECT. 52. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

SECT. 53. An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

SECT. 54. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

SECT. 55. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

SECT. 56. Where an indorsement is conditional a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

SECT. 57. Where an instrument payable to bearer is indorsed specially it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser only to such holders as make title through his indorsement.

SECT. 58. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

SECT. 59. Where an instrument is drawn or indorsed to a person as "cashier," or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated either by the indorsement of the bank or corporation, or by the indorsement of the officer.

SECT. 60. Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

SECT. 61. Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability.

SECT. 62. Except where an indorsement bears date after the maturity of the instrument every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

SECT. 63. Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

SECT. 64. An instrument negotiable in its origin continues to be

negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

SECT. 65. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the instrument.

SECT. 66. Where the holder of an instrument payable to his order transfers it for value without indorsing it the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course the negotiation takes effect as of the time when the indorsement is actually made.

SECT. 67. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of sections eighteen to two hundred and twelve, inclusive, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Rights of the Holder.

SECT. 68. The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument.

SECT. 69. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

SECT. 70. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue the holder is not deemed a holder in due course.

SECT. 71. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

SECT. 72. The title of a person who negotiates an instrument is defective within the meaning of sections eighteen to two hundred and twelve, inclusive, when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful

means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

SECT. 73. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

SECT. 74. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

SECT. 75. In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

SECT. 76. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Liabilities of Parties.

SECT. 77. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

SECT. 78. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it is dishonored, and the necessary proceedings on dishonor are duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

SECT. 79. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

SECT. 80. A person placing his signature upon an instrument

otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

SECT. 81. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties;
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer;
3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

SECT. 82. Every person negotiating an instrument by delivery or by qualified indorsement warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

SECT. 83. Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivision one, two and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it is dishonored, and the necessary proceedings on dishonor are duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

SECT. 84. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liability of an indorser.

SECT. 85. As respects one another indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

SECT. 86. Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section

eighty-two, unless he discloses the name of his principal and the fact that he is acting only as agent.

Presentment for Payment.

SECT. 87. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided presentment for payment is necessary in order to charge the drawer and indorsers.

SECT. 88. Where the instrument is not payable on demand presentment must be made on the day it falls due. Where it is payable on demand presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

SECT. 89. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

SECT. 90. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

SECT. 91. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

SECT. 92. Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during

the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

SECT. 93. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if there is any such, and if, with the exercise of reasonable diligence, he can be found.

SECT. 94. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

SECT. 95. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

SECT. 96. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

SECT. 97. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

SECT. 98. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

SECT. 99. Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment cannot be made;

2. Where the drawee is a fictitious person;

3. By waiver of presentment, express or implied.

SECT. 100. The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

SECT. 101. Subject to the provisions of sections eighteen to two hundred and twelve, inclusive, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

SECT. 102. Every negotiable instrument is payable at the time fixed therein without grace, except that three days of grace shall be allowed upon a draft or bill of exchange made payable within this commonwealth at sight, unless there is an express stipulation to the contrary. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. Instruments falling due or payable on Saturday are to be presented

for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday.

SECT. 103. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

SECT. 104. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

SECT. 105. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Notice of Dishonor.

SECT. 106. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

SECT. 107. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

SECT. 108. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party is his principal or not.

SECT. 109. Where notice is given by or on behalf of the holder it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

SECT. 110. Where notice is given by or on behalf of a party entitled to give notice it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

SECT. 111. Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

SECT. 112. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate

the notice unless the party to whom the notice is given is in fact misled thereby.

SECT. 113. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

SECT. 114. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

SECT. 115. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there is one, and if with reasonable diligence he can be found. If there is no personal representative notice may be sent to the last residence or last place of business of the deceased.

SECT. 116. Where the parties to be notified are partners notice to any one partner is notice to the firm, even though there has been a dissolution.

SECT. 117. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

SECT. 118. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

SECT. 119. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided must be given within the times fixed by sections eighteen to two hundred and twelve, inclusive.

SECT. 120. Where the person giving and the person to receive notice reside in the same place notice must be given within the following times:

1. If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following;
2. If given at his residence it must be given before the usual hours of rest on the day following;
3. If sent by mail it must be deposited in the post-office in time to reach him in usual course on the day following.

SECT. 121. Where the person giving and the person to receive notice reside in different places the notice must be given within the following times:

1. If sent by mail it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there is no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within

the time that notice would have been received in due course of mail if it had been deposited in the post-office within the time specified in the last sub-division.

SECT. 122. Where notice of dishonor is duly addressed and deposited in the post-office the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

SECT. 123. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.

SECT. 124. Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

SECT. 125. Where a party has added an address to his signature notice of dishonor must be sent to that address; but if he has not given such address then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or
2. If he lives in one place, and has his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in sections eighteen to two hundred and twelve, inclusive, it will be sufficient, though not sent in accordance with the requirements of this section.

SECT. 126. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

SECT. 127. Where the waiver is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

SECT. 128. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor.

SECT. 129. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

SECT. 130. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate notice must be given with reasonable diligence.

SECT. 131. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;

2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. Where the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. Where the drawer has countermanded payment.

SECT. 132. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation.

SECT. 133. Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

SECT. 134. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

SECT. 135. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be; but protest is not required, except in the case of foreign bills of exchange.

Discharge.

SECT. 136. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

SECT. 137. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

SECT. 138. Where the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

SECT. 139. The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

SECT. 140. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

SECT. 141. Where a negotiable instrument is materially altered without the assent of all parties liable thereon it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

SECT. 142. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect is a material alteration.

BILLS OF EXCHANGE.

Form and Interpretation.

SECT. 143. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

SECT. 144. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof and the drawee is not liable on the bill unless and until he accepts the same.

SECT. 145. A bill may be addressed to two or more drawees jointly whether they are partners or not; but not to two or more drawees in the alternative or in succession.

SECT. 146. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this commonwealth. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill.

SECT. 147. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

SECT. 148. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need, or not, as he may see fit.

Acceptance.

SECT. 149. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

SECT. 150. The holder of a bill presenting the same for acceptance may require the acceptance to be written on the bill and, if such request is refused, may treat the bill as dishonored.

SECT. 151. Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

SECT. 152. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

SECT. 153. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

SECT. 154. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

SECT. 155. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

SECT. 156. An acceptance is either general or qualified. A general acceptance accepts without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

SECT. 157. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

SECT. 158. An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

SECT. 159. The holder may refuse to take a qualified acceptance, and, if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

Presentment for Acceptance.

SECT. 160. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

SECT. 161. Except as herein otherwise provided the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so the drawer and all indorsers are discharged.

SECT. 162. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf: and

1. Where a bill is addressed to two or more drawees who are not partners presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

SECT. 163. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections eighty-nine and one hundred and two. When Saturday is not otherwise a holiday presentment for acceptance may be made before twelve o'clock noon on that day.

SECT. 164. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

SECT. 165. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;

2. Where, after the exercise of reasonable diligence, presentment cannot be made;

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

SECT. 166. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by sections eighteen to two hundred and twelve, inclusive, is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted.

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

SECT. 167. Where a bill is duly presented for acceptance and is not accepted within the prescribed time the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and the indorsers.

SECT. 168. When a bill is dishonored by non-acceptance an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

Protest.

SECT. 169. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment it must be duly protested for non-payment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill protest thereof in case of dishonor is unnecessary.

SECT. 170. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;

2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

SECT. 171. Protest may be made by:

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

SECT. 172. When a bill is protested such protest must be made on the day of its dishonor, unless delay is excused as herein provided.

When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

SECT. 173. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by non-acceptance it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

SECT. 174. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

SECT. 175. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

SECT. 176. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

SECT. 177. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it protest may be made on a copy or written particulars thereof.

Acceptance for Honor.

SECT. 178. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene, and accept the bill *supra protest* for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party.

SECT. 179. An acceptance for honor *supra protest* must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

SECT. 180. Where an acceptance for honor does not expressly state for whose honor it is made it is deemed to be an acceptance for the honor of the drawer.

SECT. 181. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

SECT. 182. The acceptor for honor by such acceptance engages

that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

SECT. 183. Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

SECT. 184. Where a dishonored bill has been accepted for honor *supra protest* or contains a reference in case of need it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

SECT. 185. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested then it must be forwarded within the time specified in section one hundred and twenty-one.

SECT. 186. The provisions of section ninety-eight shall apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

SECT. 187. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

Payment for Honor.

SECT. 188. Where a bill has been protested for non-payment any person may intervene and pay it *supra protest* for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

SECT. 189. The payment for honor *supra protest* in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

SECT. 190. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

SECT. 191. Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference.

SECT. 192. Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights

and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

SECT. 193. Where the holder of a bill refuses to receive payment *supra protest* he loses his right of recourse against any party who would have been discharged by such payment.

SECT. 194. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

Bills in a Set.

SECT. 195. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

SECT. 196. Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

SECT. 197. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

SECT. 198. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

SECT. 199. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

SECT. 200. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

Promissory Notes and Cheques.

SECT. 201. A negotiable promissory note within the meaning of sections eighteen to two hundred and twelve, inclusive, is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him.

SECT. 202. A cheque is a bill of exchange drawn on a bank pay-

able on demand. Except as herein otherwise provided the provisions of sections eighteen to two hundred and twelve, inclusive, applicable to a bill of exchange payable on demand apply to a cheque.

SECT. 203. A cheque must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

SECT. 204. Where a cheque is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

SECT. 205. Where the holder of a cheque procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

SECT. 206. A cheque of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the cheque.

Definitions and Rules.

SECT. 207. In sections eighteen to two hundred and twelve, inclusive, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "Writing" includes print.

SECT. 208. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

SECT. 209. In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instru-

ment, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case.

SECT. 210. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

SECT. 211. The provisions of sections eighteen to two hundred and ten, inclusive, and the following section do not apply to negotiable instruments made and delivered prior to the first day of January in the year eighteen hundred and ninety-nine.

SECT. 212. In any case not provided for in sections eighteen to two hundred and eleven, inclusive, the rules of the law merchant shall govern.

INDEX.

[REFERENCES ARE TO PAGES.]

A.

ABSCONDING,

as excuse of presentment, 216, 299.

ABSENCE OF MAKER,

from home, 277-288.

ABSOLUTE DEFENCES,

fraud in regard to nature of contract, 360-366, 404.

paper void by statute, 369-371, 418, 422.

want of capacity, 408.

want of delivery, 430-437.

fraud in obtaining possession of paper not delivered, 430-437.

fraud in filling blanks in completed paper, 444-456.

alteration. (*See* ALTERATION.)

forgery of signature. (*See* FORGERY.)

ACCEPTANCE,

nature of contract, 85.

proper, 87-90.

written, 87.

words of, 87.

by stranger, 88.

for honor, 88.

virtual, 90-95.

on separate paper, 90.

promise of, 90, 95-107.

by conduct, 107-111.

funds, 111.

admits drawer's signature, 113-115, 122, 123.

but not body of bill, 121-124.

rule that acceptance admits drawer's signature qualified, 115-121.

ACCIDENT,

inevitable, as excuse of steps, 292-299.

ACCOMMODATION PAPER,

nature of, 316.

notice to purchaser, 316-319.

of fraudulent diversion, 319-321.

taken after maturity, 322-327.

English rule different from American, 323-325.

releasing drawer of bill accepted for drawer's accommodation, 348-351,
355.

[References are to pages.]

ADMINISTRATOR. (See EXECUTOR.)**AGENCY,**

- delivery by, 28.
- form of signature by agent to bind principal, 60.
- liability of agent for unauthorized signing for alleged principal, 64, 69.
- exempting agent from liability, 66-68.
- agent treated as principal as to time of notice of dishonor, 265, 276.

ALTERATION,

- right of *bona fide* holder to recover on altered instrument, 437, 438, 448, 449.
- raising sum, 437, 438, 449-456.
- immaterial, 439-442.
- cases reviewed, 440-442.
- of instrument negligently drawn, 442.
- facilitating, 444-456.
- adding words in blank left in completed instrument, 444-448.
- rule of two innocent persons, 446, 447.

(See FORGERY.)

ANNE, STATUTE OF, 15, 16.**ANOMALOUS SIGNATURE,**

- before that of payee, 71-83.
- Massachusetts rule, 73.
- New York rule, 78.
- Vermont rule, 71.
- statute rule, 78.

ASSURER. (See GUARANTY AND SURETYSHIP.)**B.****BAD FAITH,**

- taking paper under circumstances of negligence, not, 388-393.

BANK,

- debtor of depositor, 125-128.
- liability of, for dishonoring cheque, 125-131.
- paper payable at, 222-224.

BANK-NOTES,

- stolen before delivery, 436.

BEARER,

- instrument payable to fictitious person, payable to, 55-59.

BILL OF EXCHANGE,

- form of order in, 42.

BLANK INDORSEMENT.

- form of, 174-177.
- effect of, 174-177.

BLANK SPACES,

- authority to fill up, 26.
- filling of, fraudulently, in completed paper, 444-448.

BONA FIDE HOLDER,

- who is, 372.

INDEX.

501

[References are to pages.]

BURDEN OF PROOF,

in case of duress, fraud, or illegality, 457-460.
in case of want of consideration, 458.

BUSINESS PLACE,

what constitutes, 220-222.
temporary stay in a town, 277-283.

C.

CAPACITY,

admission by indorser of capacity of prior party, 195-197.
want of, absolute defence, 408.

CARPENTER'S WORK,

paper payable in, 48.

CERTAINTY,

of payment, 45-49.
of time, 45, 53.
of sum, 50.

CERTIFICATION,

OF CHEQUE,

bank not liable until, 125.
by drawer for himself, 131-134.
by payee or holder, 131-134.
not acceptance of a bill, 133.
nature of, 134.
does not admit funds conclusively, 134.

OF NOTES, 134.

OF ACCEPTANCES, 137.

CHEQUE,

presentment of, 230-233.
not properly a bill of exchange, 133.
certifying, 131-134.

COLLATERAL SECURITY,

paper held as, 46, 372-388.

COMPETENCY,

of party to paper to prove invalidity, 201-204.
(See CAPACITY.)

COMPOSITION DEED,

with reservation of remedies, 342-347.

CONDITION,

delivery upon, 30-39.
which negatives possible liability, 38.
paper held as security, 46.

CONGRESS,

residence of member of, 277-283.

CONSIDERATION,

presumption of, 8-20.
in guaranty, 328-330.
statement of, in guaranty, 328-330.

[References are to pages.]

CONSIDERATION — *continued.*

distinction between guaranty subsequent and guaranty contemporaneous, 328-330. (*See VALUABLE CONSIDERATION.*)
 illegal, 457-460.
 valuable, 372-388.

CONSTITUENT. (*See PRINCIPAL.*)**CONTINGENCY,**

instruments payable on, not negotiable, 45-53.

CONTRACT,

persons not parties to, 97-100.

CUSTODIAN,

delivery by, 28.

CUSTOM OF MERCHANTS, 1-14.**D.****DAMAGE,**

question of, on want of notice of dishonor, 304-305.

DATE,

as evidence of place of payment, 213-220.

DEATH,

of maker as excuse of steps, 300-304.

DELIVERY,

definition, 21.

by negligence, 23.

want of, not a defence against a *bona fide* holder, 427-430.

necessary to liability even as to *bona fide* holder for value, 430-437.

obtained fraudulently, 427-437.

rule in regard to innocent persons one of whom must bear the loss, 433.

lost or stolen paper once delivered, 427-437.

stolen bank-notes, not delivered, 436.

DEMAND. (*See PRESENTMENT AND DEMAND.*)**DILIGENCE,**

reasonable, enough, 283-288.

DISCHARGE. (*See PAYMENT.*)**DISCHARGE OF SURETY,**

agreement for time, 331-337.

DRAWEE,

may become holder and sue on the paper, 85-87.

bound to know drawer's signature, 113-115.

except when, 115-121.

aliter of body of bill, 121-124.

DRAWER'S CONTRACT,

drawer of bill, presumptively entitled to notice, 152.

drawer of cheque presumptively entitled to notice of dishonor, 156-160.

drawer of cheque not prejudiced by want of notice, 159-160.

time for presenting demand draft, 227-230.

time for presenting cheque, 230-232.

[References are to pages.]

DRAWER'S SIGNATURE,

acceptance an admission of, 118-115.
qualification of rule, 115-121.

DURESS,

not available against *bona fide* holder, 407-414.
burden of proof where paper was executed under, 460.

E.

EQUITIES,

not available against *bona fide* holder for value, 372, 404-430.
set-off not an equity, 424-427.

ESTOPPEL,

negligence in delivery, 435.
facilitating alterations, 444-456.
paying forged bills, 366-368.

EVIDENCE,

parol, to control indorsement, 184-189.

EXCHANGE,

added to promise, 50.

EXCUSE OF NOTICE,

no damage by want of notice, 304.
by waiver, 307-311.
does not excuse presentment, 307.

EXCUSE OF PRESENTMENT,

absconding, 216.
inevitable accident, 292-299.
mistake of post-office, 292-299.
excuse of notice, not an, 307, 308.

EXECUTOR,

personal liability of, on negotiable paper, 69.
consent of, to make title, 181-188.
indorsement by, 181, note.
period of exemption from suit, 302.
notice of dishonor to, before qualification good, 267, 268.

F.

FORBEARANCE,

agreement for, 339-347.

FOREIGN BILLS,

history of, 1-14.

FORGERY,

of signature before defendant's, 195, 196.
of drawer's signature may not be shown by drawee, 118-115.
of body of bill may be shown, 121, 124.
of acceptor's signature an absolute defence, 366-368.
paying forged paper as an estoppel, 366-368.
rule of two innocent persons, 433, 446.
raised sum, and suit to recover original amount, 437, 438, 449-456.
negligence, 442-456.
adding words in blank left in completed instrument, 444-448.

(See ALTERATION.)

[References are to pages.]

FRAUD,

- in regard to nature of contract, 360-366, 406.
- in reading or stating contract, 363-364.
- upon illiterate person, 363, 365.
- in obtaining paper not delivered, 427-437.
- inducing contract, 381, 382, 404-407.
- in filling blank in completed instrument, 444-456.

FUNDS,

- admission of, by acceptor, 111-113, 119-121.
- admission of, by certifier, 134-137.
- what meant by having, 155-159, 161, 162.

G.**GENUINENESS.** (*See* ACCEPTANCE; ALTERATION; FORGERY.)**GOOD FAITH,**

- taking paper under circumstances of negligence, 388-393.
- of holder, time of determining, 393-396.
- taking by holder presumed to be in, 457-460.

GRACE,

- abolished by Statute, 237.
- on instalment notes, 237-239.
- demand on last day of, 270.

GROSS NEGLIGENCE,

- in taking paper not bad faith, 391-393.

GUARANTY AND SURETYSHIP,

- consideration for guaranty, 328-330.
- guaranty subsequent, 328-330.
- guaranty contemporaneous, 328-330.
- statement in writing of consideration, 328-330.
- liability of guarantor, 331-335.
- discharge of surety or guarantor, 331-337.
- indorser as surety, 338.
- discharge of indorser, 338.
- agreement to give time to principal debtor, 339-347.
- accommodator as surety, 348-357.

H.**HISTORY,**

- of custom of merchants, 1-14.

HOLDER FOR VALUE,

- paper taken for pre-existing debt, 372-388.

(*See* VALUABLE CONSIDERATION.)**HOLDER'S POSITION,**

- who is holder, 358-360.
- presumptive right of action, 358-360.
- equities and set-off, 358-360.

[References are to pages.]

I.

ILLEGALITY,

- competency of indorser to prove, in contract of prior party, 201-204.
- when absolute defence, 369-372, 418.
- when an equity, 414-423.
- of consideration, 457-460.

ILLITERATE PERSON,

- fraud upon, 363, 365.

INDORSEMENT,

- anomalous, 71-83.
- necessity of, 163-168.
- holder of unindorsed paper payable to order, 163-167.
- not necessary on instrument payable to bearer, 167.
- form of, 168.
- what constitutes, 169-172.
- special, 172-174.
- after maturity, 172-174.
- in blank, 174-177.
- restrictive, 177-180.
- for collection, 177-180.
- by whom, 181-183.
- incidents of; warranties; admissions, 195-204.
- as an order, 218.
- made in cipher, 168.
- control of, by parol evidence, 184-189.
- joint, 245.
- obtained by fraud as to nature of contract, 360-366.
- induced by fraud, 404-407.

INDORSER'S CONTRACT,

- stated, 205, 206, 272.

INEVITABLE ACCIDENT,

- as excuse of steps, 292-299.
- duty after obstacle ceases, 297, 298.

INLAND BILL,

- history of, 1-14.

INSANITY,

- makes contract voidable, 409.

INSTALMENT NOTES,

- negotiability of, 237-241.
- grace on instalments, 237.

INUREMENT,

- of notice by indorser in favor of holder, 263.

J.

JOINT INDORSEMENT,

- what constitutes, 470.

L.

LAW MERCHANT,

what constitutes, 1-7.

presumptive liability of, changed by common-law judges, 8-14.

LEGAL OR ABSOLUTE DEFENCES. (*See* **ABSOLUTE DEFENCES.**)**LOST PAPER,**

presentment of, 211-213.

protest of, 211-213.

bona fide holder for value of, 434, 435.

M.

MAIL,

misdelivery by, 292-299.

notice of dishonor by, 268-277.

(*See* **POST-OFFICE.**)

MAKER,

contract of, 83.

notice that his note is lodged in bank for collection, 221, 224-226.

MATURITY,

negotiable paper overdue does not lose negotiability, 172-174.

accommodation paper taken after, 322-327.

MEMBER OF CONGRESS,

residence of, 280, 281.

MISTAKE,

money paid by, in case of forgery, 113-124.

money paid in, as to funds, by bank, 141-151.

of post-office as excuse of steps, 292-299.

in notice of dishonor, 251-254.

MONEY,

carpenter's work not, 43.

N.

NEGLIGENCE,

in regard to delivery, 23.

in regard to blanks, 26.

of collecting bank in presenting paper, 222-224.

in not reading contract, 365.

in taking negotiable paper not bad faith, 388-393.

in drawing instrument materially altered, 442.

NEGOTIABILITY,

does not cease at maturity, 172-174.

NOTARY,

certificate of, as evidence, 288.

NOTICE OF DISHONOR,

necessity of, to charge indorser, 248-254.

knowledge not equivalent of, 248-250.

form and contents of, 251-263.

[References are to pages.]

NOTICE OF DISHONOR — *continued.*

- to drawer having no funds, 152-159.
- reasonable ground to draw, 155, 158, 161-162.
- drawer of cheque presumptively entitled to, 156.
- mistakes in, 251-254.
 - not necessarily fatal, 251-254.
- object of notice, 253.
- what it should show, 253, 255.
- mere notice of non-payment, 253-258.
- cases reviewed, 256-260.
- inurement in favor of holder, 263-265.
- by party to instrument, 263-265.
- by agent, 265, 266.
- to whom, 265-267.
- how given, 268.
- when to be given, 269-277.
- where to be sent, 277.
- excuse of, 292.

NOTICE OF EQUITIES,

- taking accommodation paper with notice of fraudulent diversion, 319-321.
- taking accommodation paper after maturity, 322-327.
- holder with, taking from one who had no, 396-404.

O.**"ON OR BEFORE,"**

- payment so provided, 45, 53.

P.**PARTNERS,**

- presentment upon, 245-248.

PAYEE,

- in alternative, 43.
- administrator as, 54.
- fictitious, 55.

PAYMENT,

- "on or before," 45, 53.
- out of particular fund, 47.
- discount of bill by drawee not, 85-87.
- place of, 213-220.
- when to be made and how, in case of negotiable paper, 461-466.
- by indorser for his own release merely, 466-470.
- holder may recover full sum of maker or acceptor in such case, 466-470.
- by indorser on behalf of maker or acceptor, 466-470.
- by secondary party, 470.

PERSONAL REPRESENTATIVES,

- notice of dishonor to, 267.

PLACE OF PAYMENT,

- paper payable in another State, 213-220.
- payable generally, 216.

[References are to pages.]

PLACE OF PAYMENT — *continued.*

- absconding, 216.
- seamen, 216.
- no known residence, 216.
- removal, 217, 218.

POST-OFFICE,

- mistake of, as excuse of steps, 292-299.
- notice of dishonor through, 268-277.
- posting letter containing notice may be enough, 268

PRE-EXISTING DEBT, 372-388.**PRESENTMENT AND DEMAND,**

- necessity of presentment, 205-210.
- possession of paper necessary to make, 211-218.
- place of, 218-220.
- excuse of, 216.
- paper payable generally, 216, 224-226.
- absconding, 216.
- seamen, 216.
- no known residence, 216.
- removal, 217, 218.
- of instrument payable at bank, 222-224.
- of cheque, when, 230-233.
- of demand notes, 233-237.
- of instalment notes, 237-241.
- of sight bills, when, 227-233.
- at near midnight, 242, 243.
- reasonable hour, 242-244.
- business hours, 242.
- in evening, 242-244.
- of partnership paper, 245-248.
- in case of joint promise, 245-248, 314-315.
- paper payable at designated place, 259, 307, 308.
- excuse of, 292-306.

(See EXCUSE OF PRESENTMENT.)

PRESUMPTION,

- from fraud, duress, or illegality, 457-460.

PRINCIPALS,

- undisclosed, 60.
- how bound by agent, 60-70.

PROMISE TO ACCEPT,

- as virtual acceptance, 90-95.
- description of paper, 95, 100-102.
- as common-law contract, 95-107.
- not negotiable, 95-100.
- who may have benefit of, 95-100.
- how it differs from acceptance, 95-100.
- as affected by the Statute of Frauds, 105-107.

PROMISE TO PAY,

- as waiver of steps, 312-315.

PROMISSORY NOTE,

- form of, 40.
- history of, 1-14.

[References are to pages.]

PROTEST,

- certificate of, as evidence, 205-210.
- form of, 206.
- what it should state, 206.
- Louisiana law of, 207-210.
- of lost paper, 211.
- necessity of, 288.
- of inland bills and notes, 288.
- as evidence of the taking of steps, 288-292.
- excuse of, 292.
- waiver of, 308.

PURCHASER,

- from *bona fide* holder, rights of, 396-404.
- where purchase is after maturity, 398-404.

PUTTING UPON INQUIRY,

- negligence in taking paper, 288-293.

R.

READING CONTRACT,

- fraud as to, 360-365.
- negligence in failing to read, 365, 366.

REASONABLE DILIGENCE,

- to find maker, 283-287.
- what is, in sending notice of dishonor, 287, 288.

REASONABLE GROUND,

- for drawing bill or cheque, 152-159.

REASONABLE TIME,

- for presenting sight bill, 227-233.

RELEASE,

- of debtor as discharge of surety, 335-337.
- of prior party may discharge later, 338.
- unenforceable agreement to release prior party does not discharge surety, 339-342.
- reserving remedy against later party, 342-344.
- technical sense of, 346.
- releasing drawer of bill accepted for drawer's accommodation, 348-357.

REMOVAL,

- as excuse of presentment, 217, 218.

REPRESENTATIVE. (See AGENCY.)

RESIDENCE,

- reasonable diligence to find maker's, 277-283.
- temporary absence from, 280-283.
- of member of Congress, 280, 281.

RESTRICTIVE INDORSEMENT,

- effect of, 177-180.

S.

SEAMEN,

having no known place of residence, 216.

SEASONABLE NOTICE,

what is, 269-277.

SECURITY,

paper held as, 46, 372-388.

SET-OFF,

not available against *bona fide* holder for value, 358-360.

available against a purchaser after maturity, 424.

not an equity, 424-427.

SIGHT BILLS,

to be presented when, 227-233.

SIGNATURE,

by representative, 60-70.

in cipher, 168.

of drawer. (See ACCEPTANCE.)

STATUTE,

of Frauds as applying to oral promise to accept bill of exchange, 105.

declaring paper void, 369-372, 414-421.

Sunday, 422, 423.

usury, 189, 371, 410.

STOLEN PAPER,

bona fide holder for value of, 23-28, 427-437.

stolen bank-notes, not delivered, 436.

SUNDAY,

paper delivered on, 422, 423.

SURETYSHIP. (See GUARANTY AND SURETYSHIP.)

SURRENDER OF PAPER,

on payment, 461-467.

SUSPICION,

taking paper with suspicion of equities, 392, note.

T.

TIME,

"on or before," 45, 53.

certainty of, 45, 46, 53.

of presenting demand paper, 227-237.

of presentment, general rule, 295.

of notice, 269-277.

agreement for time to principal debtor, 339-341.

TRANSFER,

a question of control, 21.

TRUSTEES,

exempting themselves from liability, 66-68.

U.

USURY,

right of indorser to prove, in maker's contract, 201-205.
paper void for, is void in hands of *bona fide* holder for value, 189, 371, 410.

V.

VALUABLE CONSIDERATION,

holder for, 372-388.
paper taken for pre-existing debt or as collateral security, 372-388.
New York rule, 372-381.
rule in United States courts, 381-388.

VENDOR,

warranties of, 189-195.

VOID,

paper so declared by statute, 369, 371, 418, 422.
paper void because of usury, 189, 371, 410.

VOIDABLE,

paper delivered on Sunday, 422, 423.

W.

WAIVER,

by primary party, 306.
waiving notice not an excuse of demand, 307.
oral, 308-311.
promise to pay before or after maturity, 312-315.
knowledge of facts, 314, 315.

(See EXCUSE OF NOTICE; EXCUSE OF PRESENTMENT.)

WARRANTIES,

by vendor, 189-195.
by qualified indorser, 194.

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